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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 505

**GEORGE C. HOLMBERG, FRANK C. BALL, CARL J.
EASTERBERG, ET AL., ON BEHALF OF THEM-
SELVES AND ALL OTHER CREDITORS OF THE
SOUTHERN MINNESOTA JOINT STOCK LAND
BANK OF MINNEAPOLIS, PETITIONERS,**

vs.

**CHARLES ARMBRECHT AND GILBERT MILLER,
BARBARA RICHARDS MICHEL, ET AL., AS EXEC-
UTORS UNDER THE LAST WILL AND TESTA-
MENT OF JULES S. BACHE, DECEASED**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED OCTOBER 12, 1945.

CERTIORARI GRANTED NOVEMBER 19, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 505

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, ET AL., ON BEHALF OF THEMSELVES AND ALL OTHER CREDITORS OF THE SOUTHERN MINNESOTA JOINT STOCK LAND BANK OF MINNEAPOLIS, PETITIONERS,

vs.

CHARLES ARMBRECHT AND GILBERT MILLER, BARBARA RICHARDS MICHEL, ET AL., AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF JULES S. BACHE, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

GEORGE C. HOLMBERG, FRANK C. BALL,
CARL J. EASTERBERG, GEORGE F. HARDIE
and PAT B. MORRIS, on behalf of them-
selves and all other creditors of the
Southern Minnesota Joint Stock Land
Bank of Minneapolis,

Plaintiffs-Appellees,

against

CHARLES ARMBRECHT; GILBERT MILLER,
BARBARA RICHARDS MICHEL, MURIEL
RICHARDS PERSHING and DOROTHY
RICHARDS HIRSHON, as Executors under
the Last Will and Testament of Jules
S. Bache, deceased,

Defendants-Appellants.

Statement Under Rule 13.

This action was commenced by the service of a summons and complaint on defendant Jules S. Bache, now deceased, on November 17, 1943, and on defendant Charles Armbricht on November 18, 1943. Issue was joined by the service of defendants' answer on December 1, 1943. Plaintiffs' attorney is Franklin S. Wood of 20 Exchange Place, Borough of Manhattan, City of New York, and the defendants' attorneys are Cook, Lehman, Goldmark & Loeb, of 20 Pine Street, Borough of Manhattan, City of New York.

Jules S. Bache died on March 24, 1944. By stipulation and order dated April 27, 1944, Gilbert Miller, Barbara Richards Michel, Muriel Richards Pershing and Dorothy

Statement Under Rule 13

Richards Hirshon, executors under the Last Will and Testament of Jules S. Bache, deceased, were substituted as parties defendant herein. The stipulation further provided that the complaint be amended to include appropriate allegations alleging that the original defendant named herein died on March 24, 1944; that Letters Testamentary were duly issued by the Surrogate of New York County to the ~~af~~orenamed executors on March 30, 1944; that the complainants would not be required to file or serve an amended complaint and that the answer of defendant JULES S. BACHE, deceased, to the original complaint should stand as the answer of the executors without the service of an amended answer.

This action came on for trial before Honorable John W. Clancy, District Judge, without a jury, on October 10 and 16, 1944. A decision in favor of defendant Stern dismissing the complaint as to him and in favor of the plaintiffs against the defendants executors and Armbrecht was rendered by the court and findings of fact and conclusions of law were made on November 1, 1944, and a judgment thereon was entered on November 10, 1944. The judgment directs that plaintiffs recover from said defendants the sum of \$10,045.06 and that as between defendant Charles Armbrecht and defendants Gilbert Miller, Barbara Richards Michel, Muriel Richards Pershing and Dorothy Richards Hirshon, as executors of the Last Will and Testament of Jules S. Bache, deceased, defendant Charles Armbrecht ~~shall~~ be secondarily liable and defendants Gilbert Miller, Barbara Richards Michel, Muriel Richards Pershing and Dorothy Richards Hirshon, as such executors, shall be primarily liable. Notice of appeal on behalf of defendants executors and Armbrecht was filed on November 22, 1944.

Summons.**DISTRICT COURT OF THE UNITED STATES****FOR THE SOUTHERN DISTRICT OF NEW YORK**

**GEORGE C. HOLMBERG, FRANK C. BALL, CARL
J. EASTERBERG, GEORGE F. HARDIE and PAT
B. MORRIS on behalf of themselves and all
other creditors of the Southern Minnesota
Joint Stock Land Bank of Minneapolis,
Complainants,**

against

**JULES S. BACHE and CHARLES ARMBRECHT,
Defendants.**

Civil Action,
File No. 23-247

To the above named Defendants:

You are hereby summoned and required to serve upon Franklin S. Wood, Complainants' attorney, whose address is 20 Exchange Place, New York, N. Y., an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

GEORGE J. H. FOLLMER.

Dated: November 13, 1943.

Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK

GEORGE C. HOLMBERG, FRANK C. BALL, CARL
J. EASTERBERG, GEORGE F. HARDIE and PAT
B. MORRIS on behalf of themselves and all
other creditors of the Southern Minnesota
Joint Stock Land Bank of Minneapolis,
Complainants,

against

JULES S. BACHE and CHARLES ARMBRECHT,
Defendants.

Complainant George C. Holmberg, a citizen and resident of the State of Minnesota, residing in Hennepin County in said State, and complainants Frank C. Ball, Carl J. Easterberg, George F. Hardie and Pat G. Morris, who are residents and citizens of the State of Illinois, on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis, Minnesota, for this their bill of complaint against the above-named defendants, respectfully represent as follows:

FIRST: This is a suit of a civil nature. The jurisdiction of this Court is based upon the fact that the present suit arises under the Act of Congress of the United States known as the Federal Farm Loan Act (U. S. C. A., Title 12, Chapter 7); the fact that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000); and the fact that the matter in controversy is between citizens of different states.

Complaint.

SECOND: Prior to the 30th day of June, 1923, The Southern Minnesota Joint Stock Land Bank of Redwood Falls and The First Joint Stock Land Bank of Minneapolis were joint stock land bank corporations incorporated, organized and existing as such under and by virtue of an Act of Congress of July 17, 1916, as amended by Act of Congress of March 4, 1923, known as the Federal Farm Loan Act (U. S. C. A., Title 12, Chapter 7). The said The Southern Minnesota Joint Stock Land Bank of Redwood Falls had an authorized capital stock of One Million Three Hundred Thousand Dollars (\$1,300,000.00) and the said The First Joint Stock Land Bank of Minneapolis had an authorized capital stock of Five Hundred Thousand Dollars (\$500,000.00), and both said Banks were engaged in the business of joint stock land banks in the State of Minnesota as provided by said Act of Congress.

THIRD: Heretofore, on or about the 30th day of June, 1923 by virtue of an agreement made at that time between the said The First Joint Stock Land Bank of Minneapolis and said The Southern Minnesota Joint Stock Land Bank of Redwood Falls, and pursuant to the provisions of said Federal Farm Loan Act, and by the consent and authority of the Federal Farm Loan Board, the said The First Joint Stock Land Bank of Minneapolis was merged or consolidated with the said The Southern Minnesota Joint Stock Land Bank of Redwood Falls, and became a part of it, and the said The First Joint Stock Land Bank of Minneapolis ceased doing business as such bank and delivered all of its assets to the said The Southern Minnesota Joint Stock Land Bank of Redwood Falls, and the said The Southern Minnesota Joint Stock Land Bank of Redwood Falls assumed and agreed to pay and become obligated to pay and perform all of the corporate liabilities and obligations of the said The First Joint Stock Land Bank of Minneapolis.

Complaint.

FOURTH: Thereafter, on the 25th day of October, 1926, the said The Southern Minnesota Joint Stock Land Bank of Redwood Falls changed its corporate name to that of The Southern Minnesota Joint Stock Land Bank of Minneapolis and on November 20, 1926, to that of Southern Minnesota Joint Stock Land Bank of Minneapolis.

FIFTH: Prior to said consolidation of said Banks as above alleged, both said The First Joint Stock Land Bank of Minneapolis and said The Southern Minnesota Joint Stock Land Bank of Redwood Falls had assumed and incurred obligations to creditors and had issued bonds in accordance with the provisions of said Federal Farm Loan Act, and there are outstanding at this time bonds issued by said The First Joint Stock Land Bank of Minneapolis, the obligation of which was assumed by Southern Minnesota Joint Stock Land Bank of Minneapolis, and bonds issued by the latter under its former name of The Southern Minnesota Joint Stock Land Bank of Redwood Falls. All of said bonds are obligations and liabilities of The Southern Minnesota Joint Stock Land Bank of Minneapolis, and whenever reference is made herein to the bonds or other obligations of Southern Minnesota Joint Stock Land Bank of Minneapolis, it is intended to include and includes all bonds and obligations for the payment of which the said Bank is obligated, whether by virtue of having issued, sold and delivered said bonds or incurred said obligations or by virtue of having assumed payment of the same.

SIXTH: Said Southern Minnesota Joint Stock Land Bank of Minneapolis and its predecessors issued bonds which are now outstanding having a face value of Twenty-one Million Thirty-eight Thousand and Seven Hundred Dollars (\$21,038,700.00) and all of said bonds were sold to complainants and the public for their par value or approxi-

Complaint.

mate par value and the proceeds thereof were invested for the most part in farm mortgages covering farm properties situated in Minnesota and elsewhere. In addition thereto, there are outstanding and unpaid obligations incurred or assumed by said Bank, not represented by bonds, in a considerable amount, the exact amount of which is unknown to your complainants.

SEVENTH: Said Southern Minnesota Joint Stock Land Bank of Minneapolis has outstanding capital stock of the par value of Three Million Dollars (\$3,000,000.00) divided into Thirty Thousand (30,000) shares of the par value of One Hundred Dollars (\$100) each. Said shares were originally sold for approximately Three Million Dollars (\$3,000,000) in cash, which sum was paid into the treasury of said Bank.

EIGHTH: Complainants are creditors of said Southern Minnesota Joint Stock Land Bank of Minneapolis. The complainant, Frank C. Ball, is the owner of upwards of Four Thousand Dollars (\$4000) face or par value of farm loan bonds issued or assumed by said Bank, and the complainants jointly are trustees for the holders and owners of upwards of Thirteen Million Dollars (\$13,000,000) face or par value of farm loan bonds issued or assumed by the Southern Minnesota Joint Stock Land Bank of Minneapolis, the principal amount of which has not been paid. The complainants as such trustees have the duty^o and right to exercise for the benefit of such beneficiaries every power and authority vested in such beneficiaries by the terms of said Bonds and said Federal Farm Loan Act, and to represent said beneficiaries in respect of said bonds as fully as though the respective beneficiaries were acting in person, and complainants as such trustees are vested with all the rights, powers and privileges of owners of said bonds.

Complaint.

NINTH: The defendant Charles Armbrecht was the record owner of 100 shares of stock of the par value of \$10,000, in the Southern Minnesota Joint Stock Land Bank of Minneapolis on May 2, 1932.

TENTH: The defendant Jules S. Bache is the beneficial owner of the 100 shares of stock held in the name of Charles Armbrecht which he knowingly, willfully, and fraudulently caused to be placed in the name of Charles Armbrecht as a nominal party or "Dummy" for the express purpose of avoiding the stockholders' liability imposed by Section 812 U. S. C. A. Title 12, Chapter 7, and to defraud the complainants and other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis.

ELEVENTH: Complainants, promptly after investigation, had made it appear that assets of the Southern Minnesota Joint Stock Land Bank of Minneapolis might be insufficient to meet its liabilities, and that the stockholders might be liable to an assessment therein, and on or about July 28, 1932 commenced an action in the District of Minnesota, Fourth Division, wherein said bank was located on their own behalf, and on behalf of all creditors of said Bank for an adjudication of the insolvency of the Bank and the necessity of an assessment against the stockholders thereof, personally against stockholders resident in said district and against whom personal process could issue, and by mail against all stockholders of said bank who were non-residents of said district, and proceeded with all due diligence to prepare and try said action. The said action came on to be heard by Honorable Gunnar Nordbye and a decision was rendered by him thereon on or about April 20, 1935, said decision holding that the bank was insolvent and that an assessment of 100% was necessary, and the decree entered thereon, provided for the appointment of an equity receiver to collect and distribute among creditors of said

Complaint.

Bank the sums received from stockholders thereof, both in the District of Minnesota and elsewhere. Complainants, in aid of such decree and with all due diligence, thereafter instituted proceedings in the Southern District of New York on or about December 11, 1935, for the appointment of an ancillary equity receiver who would thereby be enabled on behalf of all creditors to sue the several stockholders in said district in actions at law, to collect any recoveries or payments thereon and to remit the same to the primary receiver for distribution to the creditors entitled thereto, naming as defendants said Bank, the primary receiver and three stockholders. Said proceedings were opposed by one of said stockholders, and a motion was made to dismiss the bill, which was denied by order of Honorable Robert P. Patterson therein dated April 23, 1936. Appeal was taken therefrom by said defendant and said order and decree were, on such appeal, reversed by the Circuit Court of Appeals on or about December 24, 1936, with leave to complainants to serve an amended bill of complaint. Pursuant to such mandate, and pursuant to order made by Honorable Robert P. Patterson, dated February 19, 1937, the amended bill of complaint herein was filed on or about April 17, 1937. The defendants Charles Armbrecht, Maude D. DuMont and Nehemiah Freedman could not be served in said action.

TWELFTH: Complainants did not learn until September 29, 1942, that the stock which was registered in the name of Charles Armbrecht was beneficially owned by Jules S. Bache and had no way of knowing that Jules Bache was the real and beneficial owner of the stock registered in the name of Charles Armbrecht.

THIRTEENTH: At the time of the institution of the proceedings in Minnesota, and the proceedings for the appointment of an ancillary receiver in the Southern District

Complaint.

of New York, it was doubtful, under the statute and under reported decisions, and complainants were advised by counsel that it was doubtful, whether an original representative action in equity could be maintained by complainants or other creditors except in the District of Minnesota terminating in the appointment of an equity receiver to whom the collection of claims against all stockholders would be entrusted. Reported and other decisions including the decree in such Minnesota action, and in ancillary proceedings in the Districts of Ohio, Massachusetts and Connecticut, and in Special Term of the Supreme Court of the State of New York, New York County, and in the District Court of the Southern District of New York, were authorities that a representative action in equity might not be maintained by creditors of a Joint Stock Land Bank. Until the reversal of the decree appointing an ancillary receiver on behalf of complainants, there were no reported decisions casting doubt on the propriety of proceedings instituted in this District by complainants. Complainants and their attorneys relied on such decision and authorities in pursuing the remedies which appeared open to them against the defendants, and proceeded with all due diligence to enforce them, and complainants have been constantly, since July 28, 1932, maintaining legal proceedings directed to the enforcement of their remedies against defendants.

FOURTEENTH: The action instituted in the United States District Court for the Southern District of New York came on for trial before Honorable John M. Woolsey on or about the 23rd day of May, 1938, and a decree was entered in said suit on or about January 30, 1939, adjudging that the Southern Minnesota Joint Stock Land Bank of Minneapolis was insolvent and that it was necessary to assess all stockholders to the extent of One Hundred Per Cent (100%) of the stock held by each stockholder.

Complaint.

FIFTEENTH: Thereafter and on or about May 2, 1942, complainants instituted an action against the defendants Charles Armbrecht, Maude D. DuMont and Nehemiah Freedman who could not be served in the action originally instituted in the Southern District, referred to in the foregoing paragraph, and joined as party defendants the partners doing business under the firm name and style of J. S. Bache & Company and in the course of said action learned that the name of Charles Armbrecht was used as a "dummy" or nominal party for the real and beneficial owner Jules S. Bache.

SIXTEENTH: Thereafter and by notice of motion dated March 24, 1943, the defendant Charles Armbrecht appeared specially to quash service of the summons and complaint on the ground that said defendant was not properly served with process in this action, and on October 28, 1943, by order of United States District Judge Murray Hulbert the motion to quash service of the summons and complaint as against the defendant Charles Armbrecht was granted. The complainants have thus continuously and diligently attempted by the aforesaid legal proceedings to enforce their remedies against the defendants.

SEVENTEENTH: The defendants are individually responsible equally and ratably and not one for another for all contracts, dates and engagements of said Southern Minnesota Joint Stock Land Bank of Minneapolis to the extent of the amount of stock owned by them at the par value thereof in addition to the amount paid in as represented by their shares.

EIGHTEENTH: Complainants herein bring this suit on behalf of all creditors of said Southern Minnesota Joint Stock Land Bank of Minneapolis, which creditors include bondholders of said Bank and all others who have general

Complaint.

claims against said Bank. The amount recovered by complainants herein will be for the benefit of the complainants and all other creditors of said Bank who may file and prove their claims against said Bank. It is necessary that an accounting be had among the creditors of said Bank in order to determine how much of the amount recovered shall be awarded to the complainants and to each of the other creditors. An accounting of the assets and liabilities of said Southern Minnesota Joint Stock Land Bank of Minneapolis may be necessary in order to determine the deficiency of assets and the statutory liability of its said stockholders. For these reasons, these complainants and all others in whose behalf this Bill is brought have no adequate remedy at law, and unless this Court shall take jurisdiction of this cause and exercise its equitable jurisdiction herein, these complainants and all others on whose behalf this Bill is brought will suffer great and irreparable damage, and this suit cannot be maintained against the defendants herein.

For as much, therefore, as complainants are without remedy in the premises, except in a court of equity where matters of this nature are exclusively cognizable, and to the end that they may obtain from this Honorable Court the relief to which they are by right and equity entitled, they respectfully pray:

(a) That the above defendants and each of them be directed, full and true and perfect answer to make to this Bill of Complaint;

(b) That a summons issue herein, directed to the above named defendants and each of them;

(c) That the present suit be treated and regarded in all respects as a class suit in equity wherein and whereby these complainants sue as the representatives of all creditors of said Southern Minnesota Joint Stock

Complaint.

Land Bank of Minneapolis for the purpose of enforcing the double liability of the defendant stockholders of the said Southern Minnesota Joint Stock Land Bank of Minneapolis, to the end that there may be provided a fund to be administered by this Honorable Court for the equal benefit of all of the creditors of the said Southern Minnesota Joint Stock Land Bank of Minneapolis, and that this Honorable Court if it deem it necessary, decree and order an accounting for the purpose of fixing and determining the amount of the assessment to be levied against the defendants herein;

(d) That the defendants herein and all who may be defendants hereto, be decreed and ordered to pay the amount of their respective assessments;

(e) That the sums thus realized and collected from the defendants herein be administered by this Honorable Court, as a court of equity, and be distributed ratably and equitably among the creditors of the said Southern Minnesota Joint Stock Land Bank of Minneapolis in such manner as this Honorable Court may direct and that this Honorable Court order the decree an accounting among the creditors of the said Southern Minnesota Joint Stock Land Bank of Minneapolis for the aforesaid purpose.

The Complainants pray for such other and different relief as may appear to this Honorable Court to be just and equitable in the premises.

FRANKLIN S. WOOD,
Attorney for Complainants
Office & P. O. Address
20 Exchange Place
Borough of Manhattan,
New York, N. Y.

Answer.**DISTRICT COURT OF THE UNITED STATES****FOR THE SOUTHERN DISTRICT OF NEW YORK.**

**GEORGE C. HOLMBERG, FRANK C. BALL, CARL
J. EASTERBERG, GEORGE F. HARDIE and PAT
B. MORRIS on behalf of themselves and all
other creditors of the Southern Minnesota
Joint Stock Land Bank of Minneapolis,
Complainants,**

against

**JULES S. BACHE and CHARLES ARMBRECHT,
Defendants.**

Civil Action,
File No. 23-247

The defendants Jules S. Bache and Charles Armbrrecht by Cook, Lehman, Greenman, Goldmark & Loeb, their attorneys, for their answer to the complaint herein, allege:

1. As to each and every allegation contained in paragraphs "First", "Second", "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Eighth" and "Eighteenth" of the complaint, deny that they have any knowledge or information thereof sufficient to form a belief.

2. Deny each and every allegation contained in paragraph "Tenth" of the complaint, except defendants admit that on May 2, 1932 defendant Jules S. Bache was the owner of 100 shares of stock of the Southern Minnesota Joint Stock Land Bank of Minneapolis and that the certificate for such shares was and had been at the time long prior thereto when it was acquired by said defendant registered on the books of said corporation in the name of Charles Armbrrecht.

Answer.

3. As to each and every allegation contained in paragraph "Eleventh" of the complaint, deny that they have any knowledge or information thereof sufficient to form a belief, except defendants deny that the defendant Charles Armbrecht could not have been served in the action therein referred to.

4. As to each and every allegation contained in paragraph "Thirteenth" of the complaint, deny that they have any knowledge or information thereof sufficient to form a belief, except defendants deny that the complainants and their attorneys have proceeded with all due diligence to enforce their remedies and that they have constantly since July 28, 1932 maintained legal proceedings directed to the enforcement of their remedies against these defendants.

5. Deny each and every allegation contained in paragraphs "Twelfth" and "Seventeenth" of the complaint.

6. Deny each and every allegation contained in paragraph "Fifteenth" of the complaint, except defendants admit that an action was instituted on or about May 2, 1942 by complainants herein in the United States District Court for the Southern District of New York in which defendant herein Charles Armbrecht and Maude D. DuMont and Nehemiah Friedman and certain individuals, including defendant herein Jules S. Bache, doing business under the firm name and style of J. S. Bache & Co. were named as parties defendant.

7. Deny each and every allegation contained in paragraph "Sixteenth" of the complaint, except defendants admit that defendant Charles Armbrecht appeared specially in the action mentioned in the foregoing paragraph of this answer and by notice of motion, dated March 24, 1943, moved to quash the alleged service of the summons and com-

Answer.

plaint upon him on the ground that he was not properly served with process, which motion was duly granted by United States District Judge Murray Hulbert who signed an order accordingly on October 28, 1943.

FIRST DEFENSE:

8. The time within which plaintiffs were entitled to institute the action set forth in the complaint herein expired before the commencement of this action and complainants' right to bring the action is barred by the statute of limitations in such case made and provided by the statutes of the State of New York.

SECOND DEFENSE:

9. Complainants have been guilty of laches in that they have unduly delayed the commencement of the action herein.

WHEREFORE, defendants demand judgment that the complaint herein be dismissed and that they have their costs and disbursements of this action.

COOK, LEHMAN, GREENMAN, GOLDMARK & LOEB,
Attorneys for Defendants,
By EDGAR M. SOUZA, of Counsel,
Office & P. O. Address,
No. 20 Pine Street,
Borough of Manhattan,
New York City 5, N. Y.

Testimony**UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.****GEORGE C. HOLMBERG, et al.,****Plaintiffs,****vs.****MAUDE D. DuMONT, et al.,****Defendants.****Civ. 18-110****GEORGE C. HOLMBERG, et al.,****Plaintiffs,****vs.****CHARLES ARMBRECHT, et al.,****Defendants.****Civ. 23-247****Before: HON. JOHN W. CLANCY, *District Judge.*****New York, October 10, 1944,
10.30 o'clock A. M.****APPEARANCES:****FRANKLIN S. WOOD, Esq., attorney for Plaintiffs; CLARENCE
FRIED, Esq., of counsel.****COOK, LEHMAN, GREENMAN, GOLDMARK & LOEB, Esqrs., at-
torneys for defendants; EDGAR M. SOUZA, Esq., of
counsel.**

Proceedings.

(Mr. Fried made an opening statement on behalf of the plaintiffs.)


(Mr. Souza made an opening statement on behalf of the defendants.)

The Court: We will adjourn to Monday morning at half-past ten.

(Adjourned to Monday, October 16, 1944, at 10.30 A. M.)

New York, October 16, 1944, 10.30 A. M.

(Met pursuant to adjournment.)

(Appearances  before.)

Mr. Fried: Your Honor, there are a number of stipulations and concessions between counsel. I mentioned a number of them in the opening statement. I do not know whether your Honor desires, but it might be well, if your Honor sees fit, to have me state them at this time so that we have all the stipulations and concessions for the record at this point.

As to the title of the action, it is stipulated with regard to the second consolidated action that in the place of Jules S. Bache, as an individual, there be substituted in his place and stead the names of Gilbert Miller, Barbara Richards Michel, Muriel Richards Pershing and Dorothy Richards Hirshon, as executors under the last will and testament of Jules S. Bache, deceased.

It is also stipulated that the complaint be amended to include appropriate allegations alleging that the original defendant, Jules S. Bache, died on March 24, 1944, and that letters testamentary were duly issued by the Surrogate of New York County to the aforementioned executors on March 30, 1944, and that the complainants were not required to serve and file an amended complaint.

Proceedings.

It was further stipulated that the pleadings of the original parties remain as the pleadings of the substituted parties.

It has also been stipulated in relation to the assets and liabilities of the Southern Minnesota Joint Stock Land Bank of Minneapolis, that the liabilities of that bank exceeded its assets by \$3,000,000, the amount of its total outstanding capital stock, and that there is need for an assessment to the extent of 100 percent of the stock owned by the shareholders of the Southern Minnesota Joint Stock Land Bank of Minneapolis.

It is further conceded in the pleadings that Mr. Jules S. Bache individually was the owner of the 100 shares of stock registered in the name of Charles Armbrrecht as of May 2, 1932, the date when the bank closed.

It is also conceded by the attorneys for the defendants that the complainants in this case are trustees with upwards of \$13,000,000 worth of bonds of the bank, and that the complainant Frank C. Ball is the owner of \$4,000 face amount of bonds of said bank.

Mr. Souza: May I state for the record that I do not concede that in the sense that that is the fact. I concede if witnesses were called from Minnesota they would so testify.

Mr. Fried: I am sorry. I should have said that. I believe to the same effect it is also conceded that if a witness were called on behalf of the complainant he would testify that the records of the bank indicate that Charles Armbrrecht was the owner of 100 shares of stock of the bank on May 2, 1932.

The Court: What is the difference between that and the beneficial owner?

Mr. Fried: I said Mr. Bache admitted he was the beneficial owner of the stock and now I am saying if a witness were called he would testify that according to the records of the bank there would be an indication that Charles Armbrrecht was the owner of record of 100 shares of stock of that bank.

Proceedings.

On this latter score I offer in evidence the stub certificate of the bank indicating that certificate 7079 was issued to Charles Armbricht, care of J. S. Bache & Co., 42 Broadway, New York, on January 20, 1928, and there is a receipt dated January 23, 1928, with a rubber stamp, "J. S. Bache & Co., 42 Broadway."

(Marked Plaintiffs' Exhibit 1.)

Mr. Souza: In that connection, if your Honor please, in view of the fact that these are photostatic copies of the records, and I have stipulated that if a witness were here he would testify to that fact, I also want to have it understood that I shall be free, if I find it necessary, to offer in evidence, upon the same understanding if a witness were here he would so testify, that certain stock certificates which were originally in the name of J. S. Bache & Co. were transferred to Armbricht's name, making up these 100 shares, in January of 1928. In other words, Mr. Fried sent me over, the other day, I think it was Friday afternoon, copies of some earlier stock certificates which were used as a basis for this transfer of the 100 shares in the name of Charles Armbricht, and it may be it will be necessary during the trial to use this as evidence, and I want the same understanding, that I can use them the same as he is using these photostatic copies; in other words, I do not want to be met by the objection that they are photostatic copies.

Mr. Fried: No. I also offer at this time photostatic copy of certificate No. 7080, from the stub book of the bank, indicating that 50 shares of stock had been issued to Charles Armbricht, c/o J. S. Bache & Co., 42 Broadway, New York City, on January 19, 1928, and dated January 23, 1928, with a rubber stamp of J. S. Bache & Co., 42 Broadway, New York City,

(Marked Plaintiffs' Exhibit 2.)

Proceedings.

Mr. Fried: On the same assumption, that if a witness were called he would testify, I offer in evidence a photo-static copy of the ledger of the bank—

The Court: What is the difference between stating if a witness were called he would testify to some records, or he would testify to a fact? Has the Judge any province to refuse to accept the evidence?

Mr. Souza: No. I should say, your Honor, that you would accept that as the evidence in the case. Because I am not going to attempt to contradict this. It might be different if I were attempting to contradict it, but I am not.

(Marked Plaintiffs' Exhibit 3.)

Mr. Fried: Your Honor, I have here the examination of the defendant Morton F. Stern, and I could offer that in evidence rather than read it, if your Honor wishes me to do that. It is not very long. And we can offer that in question and answer form if it is so desired.

The Court: I will take it. Maybe you had better read it.

Mr. Souza: As I understand the rule, does not counsel have to show that the individual is not within 100 miles of the court in order to read a deposition in, or that there is some other reason why he is not available?

The Court: How was the deposition taken?

Mr. Fried: It was taken of the defendant in this action as an adverse party. As I understand the rule, when it is taken of a party, there is no necessity of any showing. I might add for the record that we have been endeavoring to subpoena Mr. Stern since Friday night and he has been evading service.

The Court: I think the deposition, according to the rule, the witness being a party, is admissible.

Mr. Souza: As a matter of fact, Mr. Stern is going to be here some time this morning.

Mr. Fried: I have had my process server trying to locate him since Friday.

Deposition of Morton F. Stern.

Mr. Souza: I did not know that. I know that he was at his office all Saturday morning because I was talking to him.

The Court: Is it a question and answer deposition?

Mr. Fried: Yes. Mr. Souza was present at the time.

The Court: I will allow you to read it.

Mr. Souza: I respectfully except.

(Mr. Fried then read the deposition of MORTON F. STERN as follows:)

"Q. Are you a member of the firm of J. S. Bache & Co.?
A. Yes, sir.

"Q. And that is a partnership? A. That is right.

"Q. When did you become a partner of J. S. Bache & Co.?
A. 1920, I believe.

"Q. Do you know who the partners were on May 2, 1932?
A. I think I can recall them for you.

"Q. Will you state their names please? A. Jules S. Bache, Nathan Kann, Frank J. Murphy, Morton F. Stern, Fred L. Richards, Arthur F. Broderick, Joseph P. Griffin, Hugo J. Lion, Harold L. Bache, Walter F. Schultze and Seymour M. Ottenberg. I think that's all. I don't think I left anyone out. Mr. Kann was a limited partner.

"Q. Are you certain about this? A. Reasonably sure.

"Q. In the event you find need for any correction, will you make it? A. Yes, sir.

"Q. Do you know the defendant Charles Ambrecht? A. Yes, I do.

"Q. Was he formerly connected with J. S. Bache & Co.?
A. He was.

"Q. In what capacity? A. Connected with the cage—cashier's department.

"Q. Was he an employee? A. He was.

"Q. He was not a partner? A. No, sir.

"Q. Was he employed by J. S. Bache & Co. in 1932? A. He was.

Deposition of Morton F. Stern

"Q. And prior thereto? A. Yes, sir.

"Q. Are you familiar with the fact that certain shares of stock in the Southern Minnesota Joint Stock Land Bank of Minneapolis were registered in the name of Charles Armbrecht? A. I verified that recently.

"Q. It is a fact, is it not, that 100 shares of the capital stock of the Southern Minnesota Joint Stock Land Bank of Minneapolis were registered in the name of Charles Armbrecht? A. I haven't seen the certificate.

"Q. You say you verified that recently—what did you consult? A. One of my employees told me that 100 shares had been registered in Armbrecht's name.

"Q. Do you know whether these 100 shares were purchased for a customer of J. S. Bache & Co.? A. Being unable to get the ledgers showing the actual date of purchase I cannot make an affirmative statement, but our records show that we were holding 100 shares of this stock for a customer in 1932.

"Q. Do you know the name of the customer? A. The customer that was long of it in 1932 was Jules S. Bache."

Mr. Souza: I object to the balance of the answer, if your Honor please, as incompetent, irrelevant and immaterial. The balance is "It is possible that at a previous date it may have been either held or purchased for one of his various holding companies."

The Court: I will strike out the part "It is possible," and sustain the objection to it.

Mr. Fried: The first sentence is proper?

The Court: That is right.

Mr. Fried: While I think it is immaterial, the fact remains that I do not think Mr. Souza is in position to strike out an answer of his witness. If it is not responsive I understand the rule to be the attorney who asked the question has the privilege of either making that motion or accepting the answer.

Deposition of Morton F. Stern.

The Court: I would not agree with that at all. I think when these depositions are produced on the trial they are subject to objection from any counsel.

Mr. Fried: I won't argue the point.

Mr. Souza: The rule so states.

"It is possible that at a previous date it may have been either held or purchased for one of his various holding companies.

"Q. Who was it that issued instructions that the stock be purchased in Mr. Armbrecht's name? A. That I would be unable to answer.

"Q. Do you know how the stock was paid for? A. No, I have no records to show that and no memory of it.

"Q. Do you know from whom it was purchased? A. Same answer—no records and no memory.

"Q. It is a fact, is it not, Mr. Stern, that Mr. Armbrecht's name was merely used as a nominal party? A. That I could not answer.

"Q. Do you know whether Mr. Armbrecht purchased this for his own use? A. I presume not, but as there are no records my statements must be taken as an opinion and not as fact.

"Q. Was it the practice of J. S. Bache & Co. to purchase bank stocks in the name of nominal parties? A. We never purchased any securities in names other than the actual purchaser.

"Q. Is Charles Armbrecht presently employed by J. S. Bache & Co.? A. We have been pensioning him for the last four years or five years. He is a very old gentleman and very sickly.

"Q. Do you have any records which show the nature of this transaction. I mean with respect to the purchase of 100 shares in the name of Charles Armbrecht? A. Our records do not run back that far, as it is our practice and

Deposition of Morton F. Stern.

has been for the last seven or eight years to only keep ten year records.

"Q. You stated before that you verified that 100 shares stood in the name of Charles Ambrecht, now I ask you what records did you consult in obtaining that information? A. I obtained that information from one of my employees by the name of Graham and I did not consult any records.

"Q. Do you know whether he consulted any records of J. S. Bache & Co.? A. I did not ask him and I have no knowledge as to whether he consulted records or not.

"Q. Do you know of any records that you could consult to verify this information that you obtained from Mr. Graham? A. A very simple way would be to get the actual certificate out and look at it if it is still held by us for one of our clients.

Q. Did you search your records to ascertain if that certificate is in your possession? A. No, sir.

"By Mr. Souza: It has not been in the possession of J. S. Bache & Co. since 1933.

"Q. Do your records indicate what happened to that certificate? A. Our stock record indicates that on January 6, 1933, the certificate was delivered out of our possession.

"Q. To whom? A. To Mr. Jules S. Bache or one of his nominees.

"Q. Can I have that marked for identification?

"By Mr. Souza: What?

"Q. That record he is looking at?

"By Mr. Souza: Yes.

"(The witness produced and examined a photostatic copy of the stock record showing entries under the

Deposition of Morton F. Stern.

heading 'Southern Minnesota Joint Stock Land Bank of Minneapolis October, 1931 to January 6, 1933.' Marked Complainants' Exhibit 1 for Identification.)

"Q. May we have a copy of that?

"By Mr. Souza: Yes, I will have a copy made for you.

"Q. Is Mr. Bache at the present time a member of the partnership of J. S. Bache & Co.? A. He is."

Mr. Fried: At this time I offer in evidence the photostatic copy which was marked Complainant's Exhibit 1 in the examination of Morton F. Stern. It is a photostatic copy of a ledger sheet of J. S. Bache & Company entitled "Southern Minnesota Joint Stock Land Bank of Minneapolis", and it indicates that Mr. J. S. Bache was long 100 shares of that stock starting with October, 1931.

(Marked Plaintiffs' Exhibit 4.)

Mr. Fried: Now, if your Honor please, I should like to read from the examination before trial of Mr. Charles Armbricht, taken at the office of Cook, Lehman, Greenman, Goldmark & Loeb, and verified on May 12, 1944.

Mr. Souza: If your Honor please, I press my objection to this deposition at this time under Rule 26, "Deposition Pending Action", and I call your Honor's attention to subdivision (3) of subsection (d), which reads as follows:

"Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party

Deposition of Morton F. Stern.

who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

“(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

“(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or, 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or, 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or, 5, upon application and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice, and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.”

Mr. Fried: Well, I did not think there would be any objection to Mr. Armbrecht's testimony. Mr. Armbrecht is some 79 years old.

Mr. Souza: He is 87 or 88 or 89, he claims.

Mr. Fried: To bring him down would be a hardship, but he is Mr. Souza's client and if he insists upon it I will have him subpoenaed and brought down here.

The Court: After reading this rule I should say the objection is valid.

Deposition of Morton F. Stern.

Mr. Fried: I may be impressed by the State court rule, but frankly if Mr. Souza reads from the rule I assume he is reading correctly, and I cannot disagree if that is what the rule says.

The Court: Maybe his objection to Mr. Stern's deposition is well taken, too.

Mr. Fried: Mr. Stern is here now.

The Court: That does not relieve my record of error if I have made one.

Mr. Fried: That is correct. I can call Mr. Stern as my witness unless Mr. Souza will concede that the reading of the deposition in the record is at this time satisfactory and that objection is waived.

Mr. Souza: I will waive the objections to the Stern examination, if your Honor please.

The Court: I will sustain your objection to this one.

Mr. Fried: Your Honor, I have prepared a statement, and I have furnished a copy to my adversary, or what I would testify if I am called as a witness. I am prepared to take the oath and be cross-examined regarding the statements I make in this prepared form. If there is no objection I should like to offer that statement in evidence.

Mr. Souza: I am sorry, if your Honor please, but I will have to object to the statement in this form. It is not in such form that it can go in the record in this way, and if Mr. Fried wants to testify to it, he will just have to do it.

Mr. Fried: May I first call this witness, Mr. Armbricht's son?

Charles Armbrecht, Jr.—For Plaintiffs—Direct—Cross.

CHARLES ARMBRECHT, JR., called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. Fried.

Q. Mr. Armbrecht, are you the son of Charles Armbrecht? A. Yes, sir.

Q. He was formerly employed by J. S. Bache & Co.? A. Yes, sir.

Q. Where does he reside now? A. 2643 Davidson Avenue, Bronx.

Q. How old is your father now? A. He was eighty-nine on August 30th of this year.

Q. Is your father able to come to court? A. Oh, the last year his legs have been very bad and he very seldom goes out.

Q. Is he able to walk now? A. Yes, he walks a block or two; sometimes a little more than that.

Q. Is he able to come down to court, as far downtown as this? A. Yes, if he does not have to walk far. He goes downtown once in a while.

Q. How much of a walk does he have to the subway? A. About two blocks.

Mr. Fried: That is all.

Cross-examination by Mr. Souza.

Q. Do you know that he was downtown quite recently at the office of J. S. Bache & Company, to get his pension check? A. He goes down about every two weeks; some times maybe only once a month, but that is only a short distance to go from his house to the subway; it is one block, and then it is two doors to the office of J. S. Bache & Company.

Deposition of Charles Armbrecht, Sr.

Q. You do not know of any reason why he could not come down here today if he were subpoenaed, do you? A. No, I do not think so.

Mr. Souza: That is all.

The Court: Do you really object to that deposition now? I think on the testimony that going down to cash a check once in a while and coming to court are very different things. He would have to climb the front steps of this courthouse if nothing else. I think they are two different situations. I think it is very doubtful whether he really is able to come to this court.

Mr. Souza: If your Honor feels that way about it I certainly have no objection to your Honor ruling that way.

The Court: Is there any substantial point depending on his testimony?

Mr. Souza: I don't think so, really. I don't think there really is.

The Court: Very good. We will take his deposition and let him stay home.

(Deposition of CHARLES ARMBRECHT, SR., read by Mr. Fried:)

"Direct examination by Mr. Fried:

"Q. What is your full name? A. My full name is Ernest Charles Louis, but I always give my name out as Charles; that is what I have been called since I came to the firm.

"Q. What is your last name? A. Armbrecht.

"Q. Where do you live, Mr. Armbrecht? A. 2643 Davidson Avenue. I am boarding, that is to say I live there.

"Q. Are you the Charles Armbrecht named as a defendant in this action? A. I can't get that.

Deposition of Charles Armbrecht, Sr.

"Q. Withdrawn. Did you ever hear of the Southern Minnesota Joint Stock Land Bank of Minneapolis? A. I don't remember it.

"Q. Did you ever buy any stock in the Southern Minnesota Joint Stock Land Bank of Minneapolis? A. I never bought any of that stock.

"Q. Did you ever pay for any stock of the Southern Minnesota Joint Stock Land Bank of Minneapolis? A. How can I when I didn't buy it?

"Q. Did you ever sign any checks in payment for that stock? A. No, I have no right to sign any checks at all.

"Q. Did you have any conversation with Mr. Jules S. Bache about stock in the Southern Minnesota Joint Stock Land Bank of Minneapolis?"

Mr. Souza: I object to that, if your Honor please, whether he had any conversation with him or not.

The Court: Why?

Mr. Souza: Mr. Bache is dead.

The Court: Is Mr. Armbrecht making any claim through him? I do not think that is an objection. I will overrule it.

Mr. Souza: Exception.

Mr. Fried (continuing reading):

"A. He never told me anything about any stocks at all.

"Q. Did Mr. Bache ever tell you that he bought stock of the Southern Minnesota Joint Stock Land Bank of Minneapolis in your name?"

Mr. Souza: I object to that, if your Honor please.

The Court: The same ruling.

Mr. Souza: Let me call your Honor's attention to the fact that here we have a question as to whether Mr. Bache's estate is liable in connection with this stock and possibly as between Mr. Armbrecht and Mr. Bache.

Deposition of Charles Armbrecht, Sr.

The Court: I will overrule the objection. It is under Section 3471

Mr. Souza: Yes.

The Court: I will overrule it.

Mr. Souza: Exception.

(Mr. Fried continued reading as follows:)

“A. He never told me anything. Very seldom I seen him at the office.”

“Q. Did you ever know that stock of the Southern Minnesota Joint Stock Land Bank of Minneapolis was put in your name? A. I don't know nothing about it.

“Q. Did anyone else in the firm of J. S. Bache & Co. tell you about the stock being registered in your name? A. No, nobody ever told me anything about it.

“Q. When, for the first time, did you learn that there was a claim by the complainants in this action that there were shares of stock of the Southern Minnesota Joint Stock Land Bank of Minneapolis registered in your name? A. Only here lately that I heard about it.

“Q. You never knew about that before? A. I don't remember.

“Q. Did you ever spend any money of your own to buy any stock in the Southern Minnesota Joint Stock Land Bank of Minneapolis? A. No. I was afraid of that because I didn't have enough money to buy any.

“Q. Did you ever have \$10,000 to buy shares of stock in the Southern Minnesota Joint Stock Land Bank of Minneapolis? A. No. If I had \$10,000 I would think I was a millionaire.”

Mr. Souza: I move to strike out all after “No”.

The Court: Strike it out.

Clarence Fried—For Plaintiffs—Direct.

CLARENCE FRIED, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

(147-22 73rd Avenue, Kew Gardens Hills, Long Island.)

The Witness: Does your Honor desire this in question and answer form or narrative?

The Court: I think it ought to be put in question and answer form.

Direct examination by Mr. Fried.

Q. Are you an attorney at law, admitted to practice in the State of New York? A. I am.

Q. Are you also duly admitted to practice law in the Southern and Eastern Districts of New York and the Circuit Court of Appeals for the Second Circuit? A. I am.

Q. Are you associated with Franklin S. Wood, attorney for the complainants? A. I am.

Q. When did you become associated with Mr. Wood?
A. In the latter part of March, 1936.

Q. Since that date to the present time have you been in charge of the litigation on behalf of the complainants, of the creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis? A. I have been.

Q. At the time you became associated with Mr. Wood what was the status of the proceeding by the complainants?
A. When I became associated with Mr. Wood there was a proceeding pending in the United States District Court for the Southern District of New York, entitled George C. Holmberg, et al., against Frederick S. Carr, et al., Inc., E-81-369.

Q. What was the nature of that action?

Clarence Fried—For Plaintiffs—Direct.

Mr. Souza: Now, I object to it as immaterial.

The Court: I will allow it.

Mr. Souza: Exception.

A. The complainants in that case were identical with the complainants in this action. Besides the named defendant Frederick S. Carr, the bank and its receiver, Irving J. Friede, there were two other resident stockholders named as parties defendant, namely, Ralph Behrisch and Caroline T. Behrisch. The action was one for the appointment of an ancillary receiver. The complaint briefly alleged that the Southern Minnesota Bank closed its doors on May 2nd, 1932; that the Federal Farm Loan Board on that day appointed a receiver because of the declaration by that board of the insolvency of the bank, and that on July 28, 1932, the complainants, who were the same complainants as in suit and in the previous suit, instituted an action as creditors of the bank in the United States District Court, District of Minnesota, Fourth Division, against all stockholders of the bank for the purpose of enforcing the stockholders' liability created and provided for by an Act of Congress known as the Federal Farm Loan Act, U. S. C. A., Title 12, Chapter 7, Section 812.

Mr. Souza: If your Honor please, may I have it noted on the record at this point that no member of the firm of J. S. Bache & Company nor the firm of J. S. Bache & Company nor Mr. Jules S. Bache were parties defendant in that suit.

Mr. Fried: I am willing to concede that, your Honor.

The Court: All right.

A. (Continuing) In the bill there were named as defendants that bank and all stockholders of the bank who appeared as owners of record on May 2nd, 1932. Some

Clarence Friede—For Plaintiffs—Direct.

of the stockholders resided in Minnesota and many others resided outside of the State. Service was effected upon the stockholders who were residents of the State of Minnesota and those who could be found in that State, and service upon non-resident stockholders was had by publication by order of the Court and by mail addressed to the stockholders at their addresses appearing on the stock books of the bank in accordance with the order of the Court.

The Court: Is this all in the complaint?

The Witness: This is all in the complaint.

A. (Continuing) The Minnesota court, after extensive trials and hearings, found that the bank was insolvent and that its liability exceeded its assets to the extent of \$4,264,687.59, and that an assessment of 100 percent against all stockholders was necessary.

The total outstanding stock of the bank was in the face amount of \$3,000,000. The decree embodying the foregoing was entered in the United States District Court, District of Minnesota, Fourth Division, on April 20, 1935. An exemplified copy of that decree was annexed to the bill of complaint instituted here in the case of Holmberg v. Carr, and in that action the bill of complaint prayed for the appointment of Irving J. Friede as ancillary receiver to enforce the decree of the Minnesota court against stockholders of the bank resident in New York. Irving J. Friede was also appointed as receiver by the Minnesota court for the enforcement of the collection of the statutory liabilities against the stockholders. He also acted in the secondary capacity as statutory receiver of the bank. I should say in a dual capacity rather than secondary capacity.

Q. What happened to the case of Holmberg v. Carr? A. A motion was made by the defendant, Frederick S. Carr,

Clarence Fried—For Plaintiffs—Direct.

to dismiss the bill of complaint and was denied by United States District Judge Robert P. Patterson, on March 9, 1936.

Mr. Souza: If your Honor please, may it be understood that I have an objection to this line of testimony as immaterial.

The Court: Overruled.

Mr. Souza: Exception.

A. (Continuing) The defendant then interposed his answer to the bill of complaint and the complainants moved to strike out the answer and for the appointment of the ancillary receiver, and by order of this Court, dated April 23, 1936, Irving J. Friede was appointed ancillary receiver. An appeal was taken from that order by the defendant Frederick S. Carr, and on appeal the Circuit Court for the Second Circuit on or about December 24, 1936, reversed the order of Honorable Robert P. Patterson and the case is cited in *Holmberg v. Carr*, 86 Fed. (2d) 727.

The Circuit Court in effect held that the Minnesota decree had no extraterritorial effect and that the statutory liability imposed by Section 812 of the Banking Law could only be enforced in this State by an original action in equity, and in that order the Circuit Court gave the complainant leave to serve an amended complaint.

Q. In the interim between the appointment of Irving J. Friede as ancillary receiver and the reversal by the Circuit Court of Appeals, what took place? A. After the appointment of Irving J. Friede as ancillary receiver by order of this Court dated April 23, 1936, I prepared summonses and complaints against the individual defendants in separate actions at law in the name of the receiver. These separate actions at law were instituted in the State courts and in the Federal court. One of such actions was instituted against the defendant Charles Armbrrecht in the

Clarence Fried—For Plaintiffs—Direct.

name of Irving J. Friede as ancillary receiver appointed by order of Judge Patterson dated April 23, 1936, against Charles Ambrecht, Index No. L-65-73.

Q. What happened to that action? A. The records of the court indicate that the complaint was served upon Charles Ambrecht by one Harry Miller on August 13, 1936, at 2565 Marion Avenue, Borough of the Bronx, City of New York. —

Q. Did Mr. Ambrecht interpose any answer in that action? A. No answer was ever interposed by the defendant.

Q. What ultimately happened to that case? A. On October 27, 1936, I prepared a form of judgment and had Mr. Wood sign it, and when I came to enter that judgment I was advised that I would have to proceed on the theory of a decree pro confesso, and it might be necessary to prove the allegations of the complaint. I then decided to wait until we were in a position to enter judgment against other defendants who had defaulted. However, when the Circuit Court reversed the order of Judge Patterson it was no longer possible to enter a judgment in that action in the name of Irving J. Friede because his appointment as ancillary receiver had been nullified by decision of the Circuit Court.

Mr. Souza: On what date?

The Witness: I have already indicated the Circuit Court rendered its decision on December 24, 1936.

Q. What then happened in the case of Holmberg v. Carr? A. As a result of the ruling of the Circuit Court, all State court actions previously instituted in the name of the receiver were discontinued and an application was made before Judge Patterson for leave to serve an amended complaint. This was in accordance with the mandate of the Circuit Court which gave the complainants

Clarence Fried—For Plaintiffs—Direct.

leave to serve an amended complaint, and on February 19, 1937, Judge Patterson made his order on the mandate permitting the complainants to amend the bill of complaint and it was thereafter filed on or about April 17, 1937.

In that action approximately 176 defendants were named and the defendant Charles Armbrrecht was also named as a party defendant.

Mr. Fried: At this time I offer in evidence a printed copy of the complaint which is identical to the complaint on file in the case of Holmberg v. Anchell, et al., which is the amended complaint in accordance with the order and mandate entered by Judge Patterson.

Mr. Souza: I object to it as irrelevant and immaterial.

The Court: Overruled.

Mr. Souza: Exception.

(Marked Plaintiffs' Exhibit 5.)

The Witness (continuing): Annexed to the bill of complaint as Schedule A are the list of stockholders as they appeared upon the records of the bank and the addresses, and the defendant Charles Armbrrecht was listed "Care J. S. Bache & Co., 100 shares, par value \$10,000."

Q. Did you issue summonses and complaints for service? A. I did.

Q. Was service made upon Charles Armbrrecht? A. I delivered a batch of printed complaints to the sheriff and advised him to make service upon the defendants, and on May 18, 1937, returns were made by the marshal and he returned a number of complaints because he could not make service and enclosed a check—

Mr. Souza: Now, if your Honor please, I move to strike out the statement "because he could not make service."

Clarence Fried—For Plaintiffs—Direct.

The Court: How about it?

Mr. Fried: I offer it in evidence at this time. Let me first testify to lay the foundation for it.

Q. Did you receive returns from the marshal? A. The complaints were returned, and the check in the sum of \$103.40 was received by me from the marshal annexed to his letter dated May 18, 1937.

Mr. Souza: I object to that, if your Honor please, as incompetent, irrelevant and immaterial, and move to strike it out.

The Court: I will deny your motion and overrule your objection.

Mr. Souza: Exception.

(Marked Plaintiffs' Exhibit 6.)

Mr. Souza: I make the further objection, if your Honor please, that Plaintiffs' Exhibit 6, dated May 18, 1937, does not indicate what the \$103.40 covered, or otherwise.

The Court: What have you to say?

Mr. Fried: I say I delivered a batch of complaints to the marshal and a check, and instructed him to serve all the defendants named on that exhibit. He subsequently returned the printed complaints and said he could find only those on whom he made return, and the others he could not find and he sent that back as a refund.

The Court: I will overrule the objection.

Mr. Souza: Exception.

Q. Did you make further attempts to locate Mr. Armbrecht? A. Yes. I personally made inquiries at 2565 Marion Avenue.

Clarence Fried—For Plaintiffs—Direct.

Mr. Souza: May I have the date of that fixed, if your Honor please.

The Witness: To the best of my recollection it was July or August of 1938. I went to the premises at 2565 Marion Avenue and made inquiries but could not find any forwarding address or any place that Mr. Armbrecht had moved to, nor did the superintendent know Mr. Armbrecht.

Mr. Souza: I object to that, if your Honor please, as incompetent, irrelevant and immaterial, and not the proper testimony as to what the superintendent knew.

The Court: Overruled.

Mr. Souza: Exception.

Q. What then happened to the case of Holmberg v. Anchell? A. The case proceeded to trial before Honorable John M. Woolsey, and started on the 23rd day of May, 1938, and ended in June of 1938. Judgment was entered in that case on January 23, 1939. Several of the defendants—

Mr. Souza: May we have the date of the decision, if your Honor please. It was on August 20, 1938.

The Witness: It was in the summer of 1938.

Mr. Souza: I have August 20, 1938.

Mr. Fried: I will accept that as correct. That is correct, yes.

The Court: A judgment entered a whole year after?

Mr. Fried: No, it was less than six months after. January 23, 1939.

The Witness (continuing): We had considerable difficulty recording the findings of fact and conclusions of law, and there was a hearing regarding the findings and conclusions after Judge Woolsey came back from his summer vacation. I do not recall the date of that. And after we

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had worked on that for a considerable length of time judgment was finally entered on January 23, 1939.

Some of the parties then took an appeal to the United States Circuit Court of Appeals for the Second Circuit, and on April 23rd the judgment was affirmed. The opinion is reported in 110 Federal (2d) 1022, under the name of *Holmberg v. Merriek*.

After the appeal was determined a rehearing was granted because of these circumstances: the affirmance of the decision was based upon the Supreme Court decision of *Russell v. Todd*, 309 U. S. 280, and a rehearing was granted after the Circuit Court had affirmed the decision in the *Holmberg* case. Consequently the appellees made an application in the Circuit Court and likewise asked for rehearing. The Circuit Court granted an extension of time to the appellees to await the outcome of the rehearing petition in the Supreme Court of the United States. In the meantime the case of *Mencher v. Richards*, which was relied upon by Mr. Justice Stone in his decision in the *Russell* case, had been taken to the New York Court of Appeals and because of that appeal the Supreme Court granted rehearing in the *Russell* case and, by the same token, rehearing was granted in the *Holmberg* case.

I then prepared an application and obtained leave to intervene as *amicus curiae* in the New York Court of Appeals and I filed a brief. The Court of Appeals rendered its decision, but did not squarely decide the question of the statute of limitations or the rule of laches involved. The United States Supreme Court then denied rehearing at 310 U. S. 658. The Circuit Court on the same day that the United States Supreme Court denied rehearing granted the appellees until June 5, 1940, and enlarged the time within which to apply for a rehearing or for reargument, and after the Supreme Court decision had been announced the appellees abandoned their application and the appeal became final.

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Q. What did you do thereafter? A. Also having reserved jurisdiction against the persons who were named and not served as defendants, I continued to investigate the facts regarding three defendants particularly in the hope of instituting another proceeding to wind up this action. In the meantime I examined defendants in supplementary proceedings and made settlements and disposed of most of the actions against the other defendants.

The three defendants against whom I proceeded were Maude DuMont, who was the record owner of 12 shares of stock in the face amount of \$1200, and one Nehemiah Freedman, who I had learned was the actual owner of \$25,000 worth of stock registered in the names of his secretaries, Helen Lavelle and Helen Levy, both names having been given to the same secretary and used by Mr. Freedman.

Mr. Souza: If your Honor please, I move to strike out this testimony in regard to Freedman on the ground it is immaterial and irrelevant and not in any respect binding upon us as to what he did in regard to Freedman or Mrs. DuMont, either.

The Court: I will allow it.

Mr. Souza: Exception.

A. (Continuing) In December of 1941 or January of 1942 I instructed the process server to again make inquiries at J. S. Bache & Company and was then advised that Mr. Armbrécht was a former employee who was retired and receiving a small pension. I then consulted Loring Staples as one of the attorneys for the receiver in Minnesota, and advised him of my findings, and he told me to proceed against the other three defendants, namely, Nehemiah Freedman, Maude DuMont and J. S. Bache & Company and Charles Armbrécht. Based on the information I had received from the process server I then prepared the complaint in the first consolidated action and

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issued a summons for service upon the members of J. S. Bache & Company and for service upon the defendant Charles Armbrecht.

The only defendant served as a member of the firm of J. S. Bache & Company was Mr. Stern. The marshal made a return that he could not find, after due diligence, Mr. Armbrecht.

I then made an application to have a private process server designated for the purpose of attempting service upon Mr. Armbrecht. That order was signed by this Court on May 22, 1942, and it designated one Sidney J. Ginsberg as a private process server to act with the same force and effect as though service were made by a U. S. marshal.

In the meantime I sent a registered letter addressed to Mr. Charles Armbrecht, care of J. S. Bache & Company, 36 Wall Street, New York, and gave my home address, not my office address, and the letter was returned marked "Not found."

Mr. Fried: The letter I now offer in evidence as the one I sent and which was returned to me.

(Short recess.)

Mr. Souza: Does it appear on the record, if your Honor please, the date of the letter, Plaintiff's Exhibit 6? I do not recall that that was put on the record.

Mr. Fried: I have here the office copy.

Mr. Souza: No. What is the postmark stamp on it?

Mr. Fried: May 5, 1942, and there is one of May 6, 1942, and one May 12, 1942.

(Marked Plaintiffs' Exhibit 7.)

The Witness (continuing): I then applied for the order that I mentioned before, and it was signed May 22, 1942, permitting Sidney J. Ginsberg, a private process server, to effect service on the defendant Charles Armbrecht. We

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had no other address for Mr. Armbrecht except care J. S. Bache & Company. When I received a telephone call from the attorneys for the defendant, asking for an extension of time, I advised them I could not grant the extension in view of the fact that I did not know the whereabouts of Charles Armbrecht. I was then told that Mr. Armbrecht resided at 1971 Webster Avenue, Borough of the Bronx, and I thereupon signed the stipulation extending the time of the defendant Stern to answer the complaint.

The defendant could not be served at that address but was properly served by the process server, Sidney J. Ginsberg, on May 29, 1942, at 2980 Valentine Avenue, Borough of the Bronx, which was the home of Mr. Armbrecht's son. In September of that year, 1942, I examined Mr. Stern at the office of Franklin S. Wood, which was then located at 120 Broadway, and then learned that according to the record of J. S. Bache & Company, Mr. Bache personally was supposedly the owner of the stock registered in the name of Charles Armbrecht. At that time I conferred with Mr. Souza and advised him in conversation that Mr. Armbrecht had been served and the case then was about to proceed to trial when I was served on March 24, 1943, with a notice of motion to quash the service of the summons and complaint on Mr. Armbrecht on the ground that he was never personally served with the summons and complaint. This motion was returnable on March 30, 1943, and hearings were held thereafter by United States District Judge Murray Hulbert, the process server in the meantime having gone into the Army, and there were first proceedings to take his deposition and finally we succeeded in obtaining his personal appearance in New York, but Judge Hulbert held that since the burden was on the complainants and we had not sustained the burden, that he would quash service of the summons upon the defendant Armbrecht. The order quashing the service was dated October 28, 1943.

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Immediately after the order was signed I undertook to prepare a summons and complaint on behalf of the complainants, the same complainants that had been named in all the previous actions, and named Charles Ambrecht and Jules S. Bache as the defendants. These new summonses and complaints were filed on November 13, 1943, and both defendants appeared by the attorneys, Cook, Lehman, Greenman, Goldmark & Loeb, by notice of appearance dated November 30, 1943.

Q. How do you account for the time between the institution of the proceedings in Minnesota in July of 1932 and the entry of the judgment in the Holmberg case in January, 1939? A. The law relating to joint stock land banks was in a considerable state of confusion at the time that the Joint Stock Land Bank failed in 1932. The act which creates the liability merely states that the stockholders of a joint stock land bank are liable equally and ratably for the debts, contracts and engagements of such a bank. It did not provide for the manner of enforcement, nor did it create or designate the name of any official who could enforce the assessment against stockholders. Accordingly in one of the earliest cases that I examined in my research, *Wheeler v. Greene*, 280 U. S. 49, the Supreme Court of the United States held that the statutory receiver appointed by the Federal Farm Loan Board merely represented the bank itself, and as such receiver took possession of its records and books and stood in the same place as that of the bank. However, that receiver could not enforce the liability created by statute for the benefit of the creditors since it was not an asset of the bank.

As the result of the decision in the case of *Wheeler v. Greene*, the case came up regarding the St. Louis Joint Stock Land Bank, and in a reported decision, *Partridge v. St. Louis Joint Stock Land Bank*, 6 Federal Supp. 395, the Court held that in view of the decision in *Wheeler v. Greene*, it became necessary upon the failure of a joint

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stock land bank to have two receivers appointed, one the statutory receiver which the Federal Farm Loan Board appointed, and the other a chancery receiver, to represent the creditors and enforce the assessment against the stockholders.

There were a number of decisions as a result of that case which then held that once the receiver was appointed by the domiciliary jurisdiction, that the action should be proceeded with as one at law.

In July of 1932, after the complainants instituted their action in Minnesota according to their research they proceeded upon the theory that once the assessment was determined in Minnesota and the assets and liabilities fixed, that that judgment would be res adjudicata in every other jurisdiction except for the personal defenses that could be asserted by defendants, and that case did not finish until 1935, and, as I have indicated, the decree was entered in the District Court of Minnesota on April 20, 1935.

The case was then referred to this jurisdiction and after our research we proceeded upon the theory that we would have to obtain the appointment of an ancillary chancery receiver and the original bill of complaint in the Holmberg v. Carr suit was framed upon that theory.

At the same time that that action was instituted here, or shortly thereafter, the creditors of the Chicago Joint Stock Land Bank had taken similar action in the domiciliary jurisdiction, and when they came to the Southern District of New York their complaint was one in equity for the assessment against the stockholders of the Chicago Joint Stock Land Bank upon the theory that it would avoid multiplicity of actions if all the defendants were named in the one suit.

The complaint in the Holmberg v. Carr case was sustained by Judge Patterson and the complaint in the case of Brusselbach v. Cagill, which related to the Chicago Joint Stock Land Bank, was dismissed by Judge Goddard.

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Defendants in both cases took appeals to the Circuit Court for the Second Circuit and both orders were reversed. The opinions were written by the Circuit Court and are reported, *Holmberg v. Carr*, 86 Fed. (2d) 727, and *Brusselbach v. Cagill*, 85 Fed. (2d) 20.

The Circuit Court said that the decree entered in the foreign jurisdiction had no extra-territorial effect; that the receiver appointed by the foreign court could not enforce any assessment here; that it was improper to have an ancillary receiver because the only way that this action could be instituted would be as an original action in equity where an accounting would be sought and the assets and liabilities again determined, and in that action the assessment made against the stockholders.

In the meantime, in the Chicago Joint Stock Land Bank case, trial was about to come up before Judge Woolsey and they had intended to rely upon the decree of domiciliary jurisdiction by reason of the ruling of the Circuit Court for the Eighth Circuit. Judge Woolsey commented upon this situation in his decision in the Brusselbach case and said that there had been some question as to whether the attorneys in the Chicago case would rely upon that decree or not, but they awaited the outcome of a Supreme Court decision, *Christopher v. Brusselbach*, where certiorari was granted for the purpose of resolving the conflict between two circuits, and in that case, reported at 302 U. S. 500, the United States Supreme Court affirmed the ruling of the Circuit Court for this circuit and held that the action could only be one in equity and had to be instituted de novo in every jurisdiction for assessment against the stockholders.

The same uncertainty of the law was commented upon by Judge Woolsey.

The Court: Had the issue of the insolvency and the liability of the stockholders to be determined in each one?

The Witness: In each one, your Honor.

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A. (Continuing) In the meantime we had obtained a number of decisions in other State courts; one in Massachusetts, and decisions in other State courts held that these were actions at law once the assessment was determined in the foreign jurisdiction, but since the decision of the Supreme Court all those decisions are no longer of binding effect.

The Court: Why was the jurisdiction in the in rem action in Minnesota binding?

The Witness: Since the United States Supreme Court in *Wheeler v. Greene* used some language where the action had to be brought in the "neighborhood", and they construed the "neighborhood" to mean where the stockholder resided, and we had construed "neighborhood" to be where the bank was situated.

The Court: But why is not the determination of the bank's condition final, as it were? Does not the receiver of the bank, the statutory receiver, represent the creditors for the purpose of determining that?

The Witness: He does not, your Honor.

The Court: Doesn't he represent them?

The Witness: He does not represent the creditors at all. He merely represents the bank. He is the assignee, as it were, for the bank.

The Court: All right. Go ahead.

The Witness (continuing): The Supreme Court then held we would have to institute separate actions in every jurisdiction. As a result of that we amended our complaint and then proceeded along the theory that the Chicago Joint Stock Land Bank case proceeded, and we amended our complaint accordingly, which was the one offered in evidence here, and ever since then I have been going on that theory.

The further time was occasioned by the question of laches which arose after the affirmance on the Court of Appeals of

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the judgment entered by Judge Woolsey on January 23rd, and the reason for that was that the question of the application of the statute of limitations or the rule of laches had been given some confusion by the Courts.

The Court: If the lawyer miscomprehends the meaning of the decision and guides himself accordingly, isn't that a fact bearing upon whether or not his client is guilty of laches?

Mr. Souza: I do not think so. I do not see why we should be bound by his mistake.

The Court: Oh, I should think so. Everybody is liable to make mistakes. Is that all?

Mr. Fried: That is all.

Cross-examination by Mr. Souza.

Q. Mr. Fried, as a result of all the uncertainty in the law in respect of the actions which you say you instituted on behalf of the creditors, the present complainants, you did in fact start an action in 1937 in which Armbrécht and a great many others were joined as parties defendant? A. Yes.

Q. And that is the case of Holmberg v. Anchell, which you referred to? A. That is correct.

Q. And as I understand it, you say the marshal made a return in 1937 that Charles Armbrécht could not be found and therefore was not served? A. He returned to me all the printed complaints. I had given him a whole batch of them and he returned the printed complaints and returned the checks for the refund.

Q. And that included the complaint you had given to be served on Charles Armbrécht? A. That is right.

Q. He made no comment? A. He said "I could not find all these other defendants, Maude DuMont, Nehemiah Freedman, and a few others."

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Q. And that was in May, 1937? A. Yes.

Q. What, if anything, did you do in the balance of 1937 to find Mr. Armbrecht? A. If my recollection serves me correctly, I asked Mr. Gillman of the Gillman Process Serving Agency to see if he could locate Mr. Armbrecht at Marion Avenue.

Q. When was this? A. I cannot give you the exact date. It was after the marshal had returned the complaints, because I had examined the file and found he was properly served at Marion Avenue in the action I referred to where there was a default, and I asked him to trace him, and he reported back and said he could not locate him and he could not be found.

Q. When did he report that? A. I would say the summer of 1937.

Q. Was that before or after you had made the personal investigation? A. Before.

Q. Was that report in writing or did Gillman give you that orally? A. No; it was oral.

Q. Was Gillman the process server that testified in the proceedings to quash the service upon Armbrecht brought before Judge Hulbert in this case? A. Well, he was one of the process servers, but he was not the process server who purportedly made the service on May 29th. That was Mr. Ginsberg.

Q. But he was the process server who hired the man who purportedly made the service? A. That is right.

Q. And he testified in this Court in that proceeding? A. That is right.

Q. Last year, in 1943? A. That is correct. I might also add, Mr. Souza, that as a matter of fact I had no information as to the identity of Mr. Armbrecht; whether he was the one we wanted or not.

Q. Did you ever look him up in the telephone book in the Bronx? A. I believe I did, and I think I found a Charles Armbrecht, Jr., listed.

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Q. Did you call up Charles Ambrecht, Jr., to find out if he was the son of Charles Ambrecht? A. I never did.

Q. Do you know whether your process server did? A. I asked Mr. Gillman to locate him and gave him that information at the time. —

Q. But you do not know what he did about it? A. My memory is hazy at this time, but—

Q. Have you any record which would show what you did? A. I might have my office diaries, if I check them back.

Q. Do you keep any records of what you do in this case? A. Of the important events, yes. I keep a record of daily events.

Q. Do you have a daily register? A. Yes.

Q. Have you got that register for the summer of 1937? A. I might have. I do not know. We moved since then and we threw out many records. The chances are they are at the office.

Q. If you have them will you produce them? A. I will be glad to.

The Court: Would you enter a telephone call with the process server?

The Witness: No, I only enter general proceedings.

Q. What, if anything, did you do after the summer of 1937 to locate Mr. Ambrecht for the balance of that year? A. I believe it was 1937 that I went up myself to Marion Avenue.

Q. Didn't you testify you went up there in the summer of 1938? A. I said that was to the best of my recollection but I do not think it was 1938, because in 1938 we were going to trial and I was preparing the case for trial before Judge Woolsey, and that took a great deal of time.

Q. You say your best recollection is you went up in the summer of 1937? A. I believe so. It was a hot day when I got up there.

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Q. I am not interested in the condition of the weather, but I would like to know the date, or approximately the date, if you can give it, when you went up to find out whether Mr. Armbrecht still lived at the address at which he had been served, 2565 Marion Avenue, in August of 1936 in the Friede case? A. I think it was in August of 1937 to my best recollection.

Q. All right. Now what did you do after August, 1937, to locate Mr. Armbrecht? A. I prepared the case again for trial against all of the defendants.

Q. I asked you what you did to locate Mr. Armbrecht? A. There was nothing more to be done.

Mr. Souza: I move to strike out that answer as not responsive.

The Court: Yes, I will strike it out.

Q. I repeat my question, Mr. Fried, what did you do after the summer of 1937 to locate Mr. Armbrecht? What was the next step you took? A. I don't think I did anything after issue was joined by all the defendants and we were going to trial.

Q. So that your answer is that so far as Mr. Armbrecht is concerned, after August, or whenever it was in the summer of 1937, when you made the visit to 2565 Marion Avenue, the Bronx, you did nothing so far as locating Mr. Armbrecht is concerned? A. That is for that year, but as you recall, I testified subsequently—

Q. For the year 1937? A. Nothing further.

Q. What did you do in the year 1938? A. I do not believe we did anything more until after judgment was entered in the Anchell case.

Q. What was the next step after that judgment was entered on January 23, 1939, in the Anchell case, so far as locating Mr. Armbrecht was concerned, and when did you take it? A. I would say it was December, 1941, or January of 1942.

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Q. That was getting close to the time, was it not, when the ten-year statute would run if that applied? A. Oh, definitely. That was one of the reasons why I had to rush it through.

Q. And did you at that time, that is, in December of 1941, or January of 1942, have some talks with the attorneys representing the bank in Minnesota, or the receiver of the bank in Minnesota? A. I had correspondence with them and I also met Loring Staples, who was a member of the firm of Cobb, Hoke, Benson, Kraus & Fagre, in New York.

Q. You met him in New York, or that firm was in New York? A. No, I met him personally right in front of this court house.

Q. Where was the office of that firm? A. In Minneapolis, Minnesota. I met him in the court house and he told me he had some Government job, and I discussed the matter with him and he told me to proceed.

Q. Throughout any of this period from the time you first got into the litigation in 1936 until say January of 1942, did you ever make any examination of the records of the bank to find any address of Charles Armbrecht? A. Yes, I wrote the bank and they told me that all they had was "c/o J. S. Bache & Co.", and that was the address we had.

Q. At the time you had this talk with the attorney from Minneapolis in January of 1942—was that it? A. No; it was the fall of 1941, I would say, or possibly the early part of 1942.

Q. Did you at that time discuss with him the possible liability of J. S. Bache & Co.? A. Yes. I told him I had received information that J. S. Bache & Co. had retired Mr. Armbrecht, and that I suspected that he was merely the nominal owner; and he said they have a number of situations where they bring suit against people they deem beneficial owners to discover whether that is actually the case, particularly where it is a Stock Exchange house.

Q. And that was as true in 1936 as it was in 1941 or 1942, wasn't it? A. Which bank are you referring to?

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Q. That they were beneficial owners of the stock? A. No, the thing that I suspected was when I received the information that Mr. Armbrecht was a former employee. As far as the records indicated he might have been a customer and in good faith it might have been transferred out, and it was only when we discovered he was a retired employee and was receiving a pension that our suspicions became aroused as to the real ownership.

Q. Wasn't any attempt made to serve Charles Armbrecht at the office of J. S. Bache & Company? A. Very definitely.

Q. When? A. All the time.

Q. What do you mean by all the time? A. Well, the first thing we did in 1935, we sent them a demand letter, addressed to that address. Mr. Wood sent a letter dated October 19, 1935. Then after that in the case of Friede v. Armbrecht I issued service of a summons and complaint in Mr. Friede's name, and that was served on Mr. Armbrecht, according to the records, at 2565 Marion Avenue. It was after I had given it to the process server that he located Mr. Armbrecht, and I believe at that time—now it comes back—he might have received the information from his son then of Mr. Armbrecht's whereabouts.

Q. That was in 1936? A. Well, he was served on August 13, 1936, but after his default I still did not know whether he was the right one or not.

Q. What effort did you make to find out? A. I tried to enter judgment after that and I found out he had moved and could not be located.

Q. How soon after the service in August of 1936 did you try to locate him? A. Well, when the amended complaint was prepared.

Q. When was that? A. 1937. It was after the mandate was signed by Judge Patterson, and it was then when the marshal said he could not serve him, that I again contacted this process server.

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Q. Did you ever try to find out whether as a matter of fact J. S. Bache & Company were ever record holders of any of this stock? A. Not prior to the information I received in 1941, and there was no occasion for me to do that.

Q. Did you make any inquiry in 1941 as to whether J. S. Bache & Company were ever record holders of any of the stock? A. Well, I say the information that I received, that he was a retired employee—

Q. What is that? A. That Mr. Armbrecht was a retired employee and that he held some subordinate position.

Q. And you got that information you say when? A. I would say that was December of 1941 or January of 1942.

Q. Did you ever make any inquiry as to whether or not—that is, of the bank or its receiver—their records showed that J. S. Bache & Company were the record owners or holders of any shares of stock of the Southern Minnesota Joint Stock Land Bank of Minneapolis. A. No, I never suspected that they were the real owners of the stock in the name of Charles Armbrecht. As far as I was concerned he was the real owner.

Q. Now since that time you have received photostatic copies of some stock certificates, have you not? A. Yes.

Q. I show you these photostatic copies and ask you whether or not those are the ones you have received.

The Court: Do you have to sue the record holder also in order to get judgment against the beneficial owner?

The Witness: No, your Honor.

A. If these are the photostats I sent you, and they seem to be, they are from the records, photostatic copies of the records of the bank.

Q. And they are the copies you received direct from your representative out there, aren't they? A. Yes. Are they—my copies or yours?

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Mr. Souza: I took them right from on top of your file here.

The Witness: Yes.

Mr. Souza: I offer them in evidence.

(Marked Defendants' Exhibits A, B and C.)

Mr. Souza: If your Honor please, may I identify these for the record. Defendants' Exhibit A is a photostatic copy of a certificate of stock No. 6098 for 10 shares to the order of J. S. Bache & Co., dated December 9, 1925.

Defendants' Exhibit B is a certificate of stock for 80 shares to the order of J. S. Bache & Co., dated February 11, 1924; and

Defendants' Exhibit C is a photostatic copy of certificate No. 6038 for 10 shares to the order of J. S. Bache & Co., and it is dated November 17, 1925.

The Court: What is the materiality of this?

Mr. Souza: The materiality is that if Mr. Fried had made an investigation it would have disclosed at that time that there was a disclaimer endorsed on each of these certificates that J. S. Bache & Co. was the owner of this stock. It appears on each one of those certificates now in evidence, and it was from those three certificates that the two certificates for 50 shares each, aggregating 100 shares, which stood in the name of Charles Ambrecht in 1932 were transferred. These certificates all have endorsed on them—it is rather difficult to read and I have put them through a magnifying glass—a disclaimer, and I will read it with your Honor's permission:

"We hereby certify that the transfer of the within shares to the names indicated by the star is made solely to complete the purchase made by us for our customer, and we have no ownership or interest therein."

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That has a bearing directly on the claim against J. S. Bache & Company. That is in the first action.

The Court: Do you think anybody is under an obligation to go into the question of the stockholders before the date of the insolvency.

Mr. Souza: They are making the claim that J. S. Bache & Co. is the owner of this stock.

The Court: What stock?

Mr. Souza: The stock in suit.

Mr. Fried: That is not that stock.

Mr. Souza: Exhibits A, B and C were transferred into the 100 shares that stood in the name of Charles Armbrecht.

The Court: I do not see that there is any more importance to that than if they were transferred to my name.

Mr. Souza: But here he says he grew suspicious that J. S. Bache & Company were the owners of this stock.

The Witness: Not from that.

The Court: From the Armbrecht stock?

The Witness: But not from that fact.

Mr. Souza: And I want to show that he made no investigation to find out whether they were or not before he brought this suit, when there was a statement on record that they had no interest in these 100 shares and they were bought for a customer.

Q. As I understand it, you never saw the originals of these photostatic copies, Defendants' Exhibits A, B and C?

A. I think I saw the originals but I did not pay any attention. They were all here at the time we had the trial before Judge Woolsey, but there was no occasion for me to go beyond the record ownership. It was only coupled with the additional information I received that that became significant.

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Q. In any event, whether there was occasion or not, you did not do it? You made no investigation? A. There was no reason.

Mr. Souza: I move to strike out "there was no reason."

The Court: You did not, anyway.

The Witness: I did not.

Q. When did you first learn that J. S. Bache & Company were not the beneficial owners of the 100 shares standing in the name of Charles Armbricht? A. When I examined Mr. Stern.

Q. And that was when? A. September of 1942.

Q. Did you at that time, or immediately thereafter, make any attempt to bring in Mr. Jules S. Bache? A. No.

Q. You did not do that until— A. The following year.

Q. And that was in November, 1943? A. Yes, that is right.

Q. Did you at any time after you started the action in 1937, personally make any inquiry of J. S. Bache & Co. as to where Charles Armbricht could be located? A. I personally?

Q. Yes. A. No.

Q. Did you ever ask them whether or not Charles Armbricht was a customer of theirs? A. No.

Q. Or whether he was an employee of theirs? A. No.

The Court: Why didn't you?

The Witness: There was no occasion for me at that time, because Charles Armbricht, so far as we knew, had been served at Marion Avenue. It was not until subsequently that he had moved and there was no suspicion on our part that he was anything but a regular customer. The process server said he had made inquiries there originally and he could not locate him there.

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Q. Did you see the two stubs of the certificates aggregating 100 shares which you put in evidence as Plaintiffs' Exhibits 1 and 2? A. Yes.

Q. You saw them when the originals were here in 1937 or 1938, in the trial before Judge Woolsey, did you not? A. I saw the original books that were here.

Q. You saw them, didn't you? A. The books were here and I just thumbed through them. I do not think I paid any particular attention to Armbrecht.

Q. Did you see that the original receipt for the stock in the name of Charles Armbrecht had been signed by J. S. Bache & Company? A. Yes. It has a rubber stamp. That is the usual receipt signed by a stock brokerage firm for its customers.

Q. Did you call up J. S. Bache & Company to find out where the customer was? A. No; I say the process server made attempts to locate Mr. Armbrecht and reported that he was unsuccessful.

Mr. Souza: I move to strike out what the process server did.

The Court: Denied.

Mr. Souza: Exception.

The Court: I have forgotten how you got the Marion Avenue address.

The Witness: The Marion Avenue address was where he was served by the process server after he reported to me he found it in the City Directory.

Mr. Souza: That is all.

(Recess until 2:10 P. M.)

Proceedings.

AFTERNOON SESSION.

Mr. Fried: Your Honor, I have here a copy of an affidavit of mailing dated August 23, 1932, by Florence Halling, who was a secretary in the office of John Benson and Loring M. Staples, and it indicates that a copy of the order which is annexed to the affidavit was mailed to all of the record stockholders of the bank. This same affidavit was offered and received in evidence before Judge Woolsey. Of course it is not the best evidence. I realize that.

The Court: Best evidence of what?

Mr. Fried: Of the actual mailing. I could bring this witness here from Minnesota or take the deposition merely to show that this copy of the order was mailed out to the record stockholders annexed to that list. If my adversary will concede that if the witness were called she would testify she mailed out the copy of this order, I believe that is all I have for the complainants.

Mr. Souza: I won't concede that, if your Honor please, because I don't think it is material. It might have been material in that other suit for some specific purpose but I do not see that there is any point about it in this suit.

The Court: I will overrule the objection as to materiality. Is that the only objection?

Mr. Souza: That is all.

Mr. Fried: I offer it in evidence.

Mr. Souza: None of the defendants are named here.

Mr. Fried: Just Ambrecht.

(Marked Plaintiffs' Exhibit 8.)

Mr. Fried: I have a copy of a letter dated October 19, 1935, addressed to Mr. Charles Ambrecht, c/o J. S. Bache & Co. This is taken from the records of our office and it was sent by Miss Vendoza, who is now on a week's leave of absence because her husband is home from the Army.

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I can have her here any time after next week to have her testify she mailed this out to Mr. Ambrecht at this address.

Mr. Souza: It appears that this letter of October 19, 1935, is addressed to Charles Ambrecht, and it is a demand made by whoever signed it as counsel to the receiver, Ervin J. Friede, and I understand that receivership was of no force and effect as it later developed, so I do not see what the purpose of it is. There is no evidence that he ever got it.

The Court: Have you any objection to the manner of proof?

Mr. Souza: Not the manner of proof, no.

The Court: I will overrule the objection.

Mr. Souza: Exception.

(Marked Plaintiffs' Exhibit 9.)

Mr. Fried: I have two more letters, your Honor, and that is the end. These are letters addressed to Charles Ambrecht of the Ambrecht Lumber Company, dated October 1, 1935, and a reply from Mr. Ambrecht saying he never owned shares of stock in the bank. I offer them solely for the purpose of showing some of the efforts exerted by our office in attempting to locate Mr. Ambrecht.

Mr. Souza: I object on the ground that they are irrelevant and immaterial.

The Court: I will take them.

(Marked Plaintiffs' Exhibits 10 and 11.)

Mr. Fried: That is the complainants' case.

Mr. Souza: Now, if your Honor please, I move to dismiss the cause of action against J. S. Bache & Company and the individual members of that firm on the ground that nowhere in the evidence does it appear that J. S.

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Bache & Company, or any member of the firm, were the beneficial owners of any of the stock in suit.

The Court: What was that testimony that was read from the first deposition?

Mr. Fried: That was Mr. Stern.

The Court: What did he say?

Mr. Fried: He said that the firm records indicated that the stock had been transferred, or indicated that Mr. Bache personally was long 100 shares of stock as of the date in the exhibit. In other words, that they had charged it out to his personal account.

Mr. Souza: Mr. Stern testified that on May 2, 1932, at the time the bank failed, the records of J. S. Bache & Company showed that the stock was the property of Jules S. Bache and it had been in his account from at least October of 1931, and was in his account until it was delivered out in January of 1933.

Mr. Fried: As I stated to your Honor before, it was only for the purpose of discovery and inspection that we proceeded against Bache & Company, and once having obtained that, there is still a question in my mind whether Bache & Company would not be liable along with Mr. Bache for having joined in the means of secreting the information from the creditors.

The Court: I am not sufficiently familiar with the statute. I will reserve decision.

Mr. Souza: In connection with my motion, if your Honor please, I also call your Honor's attention to the fact that in connection with this specific transfer of the stock to the name of Charles Armbrecht, that at the time the record shows that there was a disclaimer on the part of J. S. Bache & Company that they were the owners of the stock or had any interest in it, and there is no transfer out of Armbrecht's name from January of 1928 until the present date. Your Honor will see from these Exhibits 1 and 2—

The Court: I will reserve decision. If there is nothing

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in the language of the statute tying them up, I will grant it. Have you the statute there?

Mr. Souza: You mean the one they are suing under?

The Court: Yes.

Mr. Souza: I do not have it here, no, sir.

The Court: I will reserve decision.

Mr. Souza: I call your Honor's attention to certificates Nos. 7079 and 7080, the receipts for which were signed by J. S. Bache & Company on January 23, 1928, showing that certificate 7079 was transferred from J. S. Bache & Company to Charles Armbrecht, and certificate No. 3049, which is defendants' exhibit——

The Court: I would not regard that as evidence of anything unless you pointed out where I am wrong. Supposing I had stock in my name and stock might be issued to you in consideration of the certificate I turned in? Supposing I owned stock and it is with Bache & Company. The certificate you buy might be issued in lieu of the one I turned in, yet it would not have anything to do with the actual ownership.

Mr. Souza: If J. S. Bache & Company put a disclaimer on the certificate it would be some evidence of it and that you knew it, and it bears on any possibility of any question of fraud or hiding anything. These Exhibits 1 and 2 show that this stock issued in the name of Armbrecht was transferred from J. S. Bache & Company and the three certificates are in evidence that it was transferred from. It was never out of Armbrecht's name. Also you have the positive testimony of Mr. Stern, which is the only evidence in this case, that the stock did not belong to J. S. Bache & Company but belonged to Jules S. Bache; that Jules S. Bache was the beneficial owner, and the pleadings show that.

The Court: I think it is a good motion but I will reserve decision on it.

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Mr. Souza: As to the cause of action against Charles Ambrecht, which is the second action, I move to dismiss that on the ground that the evidence is that the action was commenced against Charles Ambrecht on November 17, 1943, and Mr. Fried said that the summons and complaint were delivered to the marshal for service, which I believe is the commencement of the action on the 13th of November, 1943, which was more than eleven years, eleven years and six months, from the time the cause of action accrued.

The Court: How about it?

Mr. Fried: As to that, your Honor, I have briefed it carefully and I will hand my brief to your Honor. It will be finished by the time I get back to the office. Judge Woolsey specifically held in the previous case that the statute of limitations is not the rule by which you measure actions in the Federal courts solely cognizable in equity, and there are many, many decisions, and it is a very confusing field, because first you have the question of law relating to concurrent remedies, and in those cases, equitable cases must follow the actions at law, and apply whatever the legal statute of limitations is if there is a concurrent remedy, and then you have the second branch of cases which hold that where you do not have a State court situation, then the Federal courts apply their own rule of equity, and a number of cases which say that in the Federal courts even in equity, by analogy only, they will apply the statute of limitations. The same question came up before Judge Patterson in the *Todd v. Russell* case, and he pointed out clearly, and it has been sustained since, that the defense of the statute of limitations is not good as a defense, but it is an element to be considered on the question of laches; in other words, if you go beyond a statutory period, then you have to examine as to what the complainants did. Were they diligent in the prosecution of their claim? The same question was presented to Judge Woolsey and he found that the rule of laches is the one that must be ap-

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plied here and he cited at length from the *Southern Pacific v. Baker* case, and on this case, while Judge Woolsey for some reason thought there was no reason for the confusion that existed in the law relating to joint stock land banks, he nevertheless held there was confusion and he pointed out all the conflicting decisions and said that in view of that state of the law it was no wonder that the complainant had delayed as long as that. As a matter of fact it was conceded in that case that if any statute applied, it was not the three-year statute, and he left that out and said inasmuch as it is in equity I will consider it on the question of laches.

Mr. Souza: In other words, there is a statute, 53 of the Civil Practice Act, which is a comprehensive statute, in this State, and which covers all proceedings, including proceedings in equity that are not otherwise specifically covered by some other statute of limitations, and that statute has been held frequently by the Court of Appeals, and I will submit you in due course a brief on that specific point, that it applies to every kind of action in equity. The cases which Mr. Fried has referred to were decided before the new equity rules went into effect in 1938 or cases that had been started, so that the question of extending the time or shortening the time by the statute of limitations could not be used. But in all cases that have started since 1938 the distinctions between actions in equity and actions at law were abolished by those new rules.

Now to come into this court and say that the ten-year statute does not apply to an action in equity is to write into the statute some express exception, such as here, an action brought by a joint stock land bank, and there is no such exception in the statute. It is comprehensive and takes in all classes of equity actions where no other limitation applies. In fact it takes in all classes of law actions.

In the case of Judge Woolsey, there was a question

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whether the three-year statute applied because of the fact they waited two years and some odd days after the decision in the Minnesota case before they started the action in New York. That was decided in 1935 and this action was commenced in 1937, and for that reason Judge Woolsey held that there was no question of the statute of limitations, and on the question of laches, because of the shortness of time, there was no question of laches and held against the defendant's contention on that particular point.

The Court: You say you are going to write a brief on this, so I do not think extended argument is necessary.

Mr. Souza: I will submit a brief, and if your Honor will let me have the copy which I gave you I will combine it all in one brief so your Honor does not have to bother with a lot of papers when you finally get to it.

I also move that if your Honor should hold that the ten-year statute does not apply, but that laches is the rule by which the conduct of the complainants is to be governed, that it also appears affirmatively that these complainants were guilty of laches in bringing their action against Mr. Armbrecht; that he was served, it appears, in 1936, by the attorneys representing these same complainants in the Fried action, and that they merely rested on a statement of a process server that he could not locate him in 1937 when the other action was started, and that they did practically nothing until he was served in 1943, more than eleven years and seven months after the cause of action accrued. Now that is as to the defendant Armbrecht.

As to the defendant Bache, I move to dismiss the complaint on the ground that it affirmatively appears from the complainants' proof and the pleadings that more than ten years have elapsed since the cause of action arose against Mr. Bache, and that therefore the action is barred by the ten-year statute of limitations, being Section 53 of the

Morton F. Stern—For Defendants—Direct.

~~New York Civil Practice Act.~~ If your Honor should hold that that statute of limitations does not apply then I also move to dismiss on the ground that it appears affirmatively that these complainants have been guilty of laches in not proceeding against Mr. Bache at an earlier date.

The Court: I will reserve decision on all motions because they really all hang together, but I do not mind saying that I think the defense of laches is not very well sustained so far by the plaintiffs' case. I think he has filled in his time pretty well. I think it would be a pretty harsh rule to find a man guilty of laches by ignoring the efforts of the process server, or, if you want to call it, the misrepresentations of a process server for a period of six months or even a year. The expiring of time alone does not mean anything. I will reserve decision on all motions.

Mr. Souza: Exception.

MORTON F. STERN, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

The Court: Is there any fraud in a man carrying stock in a name other than his own name?

Mr. Souza: Definitely not.

Mr. Fried: Judge Woolsey used that expression, your Honor, where a beneficial owner uses someone else as a shield, and he indicated that from that fact alone, and there are some cases sustaining that view, that is, where I am the real owner of stock and use a person who is irresponsible as the record owner, that that fact is indicative of fraud on the creditors of the bank.

Mr. Souza: There is no such holding that I know of, and on the contrary the Gibbs case holds to the contrary and also Frederick v. Aaron, in 264 N. Y. 368, and no obligation rests upon equitable grounds for failure to make a transfer.

Morton F. Stern—For Defendants—Direct.

The Court: That is what I think would be sound law. There must be any number of reasons that a man can give readily for carrying stock in a name other than his own.

Mr. Fried: That is true, but where he was an irresponsible party——

The Court: That does not relieve you of liability. That is the reason you are suing here.

Mr. Souza: That is exactly the holding in the Gibbs case in 118 Fed. (2d) 958.

Mr. Fried: They mention that in the case as an indication. It might well be your Honor won't consider it fraud, but at the same time——

The Court: I think in a given case it might have a fraudulent element in it, but the mere fact of the carriage of stock in another's name is no evidence of fraud at all, *prima facie*.

Mr. Fried: There is this element, and it is that aspect of the case that I think is particularly cogent, and that is the testimony of Mr. Armbrecht shows he did not know about it. Now if I am to put stock, for example, in the name of my wife, with her full knowledge, I might not be guilty.

The Court: I said before it might be an element of fraud but your client has nothing to complain about, but Mr. Armbrecht had.

Mr. Fried: Our complaint is that if they had known the real and beneficial owner, they could have proceeded sooner.

The Court: Anyway, I have reserved decision.

Direct examination by Mr. Souza.

Q. Mr. Stern, you are one of the defendants in this action? A. I am.

Morton F. Stern—For Defendants—Direct.

Q. You are a member of the firm of J. S. Bache & Company? A. Yes, sir.

Q. How long have you been a member of that firm? A. Twenty-five years.

Q. Prior to 1938, where was the office of the firm in New York City? A. Prior to 1938?

Q. Yes. A. In 42 Broadway for about thirty-odd years.

Q. And when did you move from 42 Broadway? A. I believe it was in December, 1939.

Q. And since that date you have been where? A. 36 Wall Street.

Q. Were you in your office Friday of last week? A. Friday just past?

Q. Yes. A. Until about ten minutes of seven.

Q. At 36 Wall Street? A. That is right. It is also known as 40 Wall. We have a private entrance and that is why we designate it as 36 Wall. It is really the Bank of Manhattan Building.

Q. You can go into the building through Pine Street and also Wall Street? A. That is correct.

Q. Were you in your office on Saturday of last week? A. I left early. I left at quarter of one.

Q. What time did you get down to your office? A. Nine o'clock.

Q. Were you at home on Friday night, at your residence? A. All evening.

Q. Where do you live? A. 115 Central Park West.

Q. Have you a telephone there? A. I have.

The Court: What difference does it make? You can ask all these questions over again if you want to.

Mr. Souza: Counsel made a statement that Mr. Stern had been evading service and that the process server told him he could not get him.

The Court: Lawyers are compelled to believe process servers. That is one of the hardships of prac-

Morton F. Stern—For Defendants—Direct.

ting law. I don't think there is any importance in this testimony.

Q. Mr. Stern, have you any record of J. S. Bache & Company that will show the original transaction of this stock being transferred from J. S. Bache & Company to Charles Armbrecht? A. I could not answer that. That would be the bookkeeping department or the cashier's cage.

Q. How long have you been a broker? A. Thirty-nine years.

Q. In New York City? A. That is right, with Bache.

Q. And are you familiar with the custom in respect of the registration of stock in the names of others, for customers and others? A. Oh, yes.

Q. What was the custom in 1932 and for five or six years previous to that in regard to having stock registered in the name of nominees?

Mr. Fried: I object to that, your Honor.

The Court: Was there a custom?

The Witness: Yes, we had two nominees besides our own name, both of them working in the cage.

The Court: What is your objection?

Mr. Fried: I object on the ground that any general custom they might have had is no proof of what was done in this particular case.

The Court: I will allow it.

Q. Was Charles Armbrecht an employee of J. S. Bache & Company? A. For about fifty years.

Q. Do you recall at or about the time he was pensioned? A. I was trying to refresh my memory on that. I am a little hazy. Armbrecht had an accident, his son told me during recess, about 1928. I would have thought it was a little later than that because my recollection is the new firm formed in 1933 and that was when we told Charlie he

Morton F. Stern—For Defendants—Direct.

William Graham—For Defendants—Direct.

would draw his salary as long as he lived. We had no pension fund, and it was my own idea, and Ed Weiss and myself told him to go ahead, as long as he lived he would get his weekly salary, but his son seems to think it was a little earlier than 1933, but it was in that period.

Q. Do you know of your own knowledge whether Mr. Armbrecht was a frequent visitor at J. S. Bache & Company at 42 Broadway after he was pensioned? A. Mr. Armbrecht comes down there once every week, or once every two weeks. He was there only two or three days ago. He comes down every week or two weeks.

Q. Would you say that was so during the years 1936, '37, '38, '39, 1940 and 1941? A. I would say it has always been so since he was retired, unless he happened to be laid up sick for a week or so, but he is rarely sick.

Q. Wasn't there a time in 1942 when you used to mail him his check? A. 1942? That I would not know. All I can say is that Charlie always comes in my office and pays me a visit whenever he is down, and that is very frequently.

Q. And he was down there last week? A. Last Tuesday or Wednesday.

Mr. Souza: That is all.

Mr. Fried: No questions.

WILLIAM GRAHAM, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Souza.

Q. Mr. Graham, how long have you been with J. S. Bache & Company? A. A little over twenty-five years.

Q. What is your position there? A. I am in charge of the records and credit department.

William Graham—For Defendants—Direct.

Q. Have you made a search for the records of J. S. Bache & Company for the period prior to October, 1931? A. I have.

Q. Are there any such records in existence? A. I have not been able to find any.

Q. What is the earliest record you have of J. S. Bache & Company in respect of the stock, the 100 shares of stock in question, in this suit? A. October 1931.

Q. I show you Plaintiffs' Exhibit 4, and ask you whether or not that is a correct transcript of the stock record in respect of the 100 shares of stock which we are now discussing? A. That is right. That is a photostatic copy of the stock record on the sheet, Southern Minnesota Joint Stock Land Bank of Minneapolis.

Q. Is that the only record you have in regard to this stock? A. That is the only record I could locate.

Q. Was this record made under your supervision? A. It was.

Q. Can you tell me what this reference to "J. S. Bache long account 100" under the date of October 1931 means? A. That means that in the J. S. Bache long account there were 100 shares of Southern Minnesota Joint Stock Land Bank of Minneapolis.

Q. Were you familiar generally with the J. S. Bache long account? A. I was.

Q. What was the type of that account? A. It was a margin account.

Q. And that stock continued in that account for how long? A. Until January of 1933.

Q. What date in January? A. On January 3 of 1933, the total of the account was transferred to a loan account.

Q. In other words, the stock was merely changed from the long account to the loan account? A. From the long account to the loan account.

Q. And still in Mr. Bache's name? A. The account was still in Mr. Bache's name.

William Graham—For Defendants—Direct.

Q. What is the long account? A. Just the title of the account. They changed the name from "long" to "loan."

Q. What is the difference? A. There were some regulations came up then made by the SEC. The SEC was just starting to come into prominence and they decided that they should turn the accounts to say just what they mean.

Q. In other words, a long account was really a loan account? A. It really means a loan account; the firm loaned money against the collateral in that account.

Q. So that actually there was no transfer of any kind?

A. There was only a bookkeeping entry.

Q. Now did that stock remain in this loan account there until January 6, 1933? A. Yes.

Q. What happened then? A. The certificate was delivered out of the office.

Q. During the period referred to, and from that exhibit, after January of 1933 where was the physical possession of the stock certificates which stood in the name of Charles Armbrrecht? A. It was in the vaults of J. S. Bache & Company.

Q. Does that show on that record? A. Yes, it shows it was in what we call box 1; there were a number of boxes in the cashier's department.

Q. There are some other notations on here. For instance, May of 1932, and December and January, up above. Do those entries have any significance? A. Well, the first two, the May and the December mean that the stock was carried forward for the purpose of auditing. We had outside auditors come in and check our records, and they carried forward all the stock at those periods. The January entry indicates that the sheet was closed or that they carried forward something.

Q. Have you any records which will show when Mr. Jules S. Bache first became the owner of that stock? A. I have no records in the office.

William Graham—For Defendants—Direct.

Q. Have you any personal recollection of the transaction? A. I have a recollection of a previous stock record to this which I cannot locate.

Q. Can you from your recollection of those records give us a date when Mr. Bache acquired this stock? A. My recollection is that the stock belonged to or was the property of the Winona Development Company.

Mr. Fried: I object to that.

The Court: It sounds like incompetent evidence, doesn't it?

Mr. Souza: I will withdraw the question.

Q. And you have no records now that will show whether Mr. Bache or someone else was the owner of that stock previous to October, 1931? A. No. I cannot locate that.

Q. What happened to all your records? A. Our records were all destroyed in order to make room for a new warehouse. At least we had two warehouses, two old-fashioned warehouses, and we rented a new one, and there was not room enough in the new one to put all the old records in.

Q. When did you do that? A. Some time around 1937 or 1938.

Q. At that time you say the records previous to October of 1931 were destroyed? A. That is right.

Q. Do you know Charles Armbrecht? A. I do.

Q. When is the last time you saw him? A. I saw him last week.

Q. Do you remember what day? A. Tuesday or Wednesday.

Q. Where did you see him? A. In the office. He always came to see me out in front of the window of the room I sit in.

Q. What was the practice of Mr. Armbrecht so far as coming to the office of J. S. Bache & Company is concerned, during the years previous to 1942, as far back as the time

William Graham—For Defendants—Direct.

he was pensioned? A. Well, he used to come down to pick up his salary.

Q. How often would that be?

Mr. Fried: I object to this line of testimony, your Honor.

The Court: I do not see that it has any bearing on the issues.

Mr. Souza: They say they used reasonable diligence in effecting service upon Mr. Armbrecht, at which time they might have discovered this situation, that Jules S. Bache was the owner of this stock and not Charles Armbrecht. They have delayed from 1937, from the time the marshal said he could not do anything until they served Armbrecht in 1943, when actually he was right in the County of New York and in the County of the Bronx, as I will prove in a few minutes, throughout this entire period. Any half-hearted investigation, any telephone call to J. S. Bache & Company, would have disclosed that fact.

The Court: I do not think that follows at all. He might have been in every day but it would not follow from that that a telephone call or personal visit would find out anything about it. I do not know that any of the Bache people would tell any process server anything about him. Why do you think so?

Mr. Souza: Because all they had to do was ask the question. They discovered when they asked the question but they waited eleven years to ask.

The record shows in this case that the marshal on the return, when he said he could not find Mr. Armbrecht, and when Mr. Fried got his order to get another process server to make service on him in 1942, made the notation on the record that he comes into the office of J. S. Bache & Company, Inc. Where did he get that information unless they told him? Where did

William Graham—For Defendants—Direct.
Charles Armbrecht, Jr.—For Defendants—Direct.

he get the information that he worked for J. S. Bache & Company unless J. S. Bache & Company told him?

Mr. Fried: At that time it was already in the complaint, I may point out to your Honor, because I had the information that he was a retired employee.

The Court: I do not see anything in that. Of course it is in the evidence now that he has been in the offices of J. S. Bache & Company weekly, and I believe it.

By Mr. Souza:

Q. Do you recall that you had any time received any inquiries from anybody, prior to May of 1942, for the address of Mr. Armbrecht?

Mr. Fried: I object to this as incompetent.

The Court: I will allow it.

A. No.

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Mr. Souza: That is all.

Mr. Fried: I have no questions.

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CHARLES ARMBRECHT, JR., recalled, testified further as follows:

Direct examination by Mr. Souza.

Q. Are you here today pursuant to a subpoena which I caused to be served upon you? A. Did I receive it, did you say?

Q. Are you here today pursuant to a subpoena which I caused to be served upon you? A. Yes.

Charles Armbrecht, Jr.—For Defendants—Direct.

Q. Are you the son of Charles Armbrecht, the defendant in this action? A. Yes.

Q. Where does your father reside? A. 2643 Davidson Avenue.

Q. How long has he resided there? A. Somewhere in the neighborhood of from about 1939 to the present date.

Q. And before that where did he reside? A. 1971 Webster Avenue.

Q. Also in the Bronx? A. Also in the Bronx.

Q. How long was he at that address? A. From 1936 until—the end of November, 1936, when my mother died, he moved to 1971 Webster Avenue.

Q. And before November, 1936, where did he reside? A. 2565 Marion Avenue, in the Bronx.

Q. How long did he reside there? A. About three years.

Q. Do you know where he resided prior to that? A. 307 East 188th Street.

Q. How long to your knowledge has he resided continuously in the Bronx? A. Since 1905.

Q. Do you know of your own knowledge whether or not your father was a frequent visitor at the office of J. S. Bache & Company, 42 Broadway, following the time he was pensioned?

Mr. Fried: I object to the form of the question. I think it is incompetent unless he accompanied him.

The Court: Do you know it?

The Witness: Yes, sir.

The Court: All right, go ahead.

A. After he was pensioned he went down every week to get his pay until about 1942, when they sent him a check every two weeks, and then he would go down and cash the check down town.

Q. Have you resided in the Bronx for the last fifteen years? A. Twelve years, since 1932.

Morton F. Stern—For Defendants—Direct.

Q. Has your name been in the telephone book since that time? A. Since October 1st, 1932.

Q. You have been friendly with your father throughout all that period, haven't you? A. Yes, sir.

Mr. Souza: That is all.

Mr. Fried: No questions.

MORTON F. STERN, recalled as a witness on behalf of defendants, testified further as follows:

Direct examination by Mr. Souza.

Q. Mr. Stern, you mentioned the practice or custom of having stock in the name of nominees. When stock was carried in a margin or loan account, was it the usual thing in 1930, 1931, 1932 and 1933, to carry stock in the name of a nominee in the margin account of the customer?

Mr. Fried: I object to the form of the question. I think it is incompetent. The only relevant question is, what was done in this case.

The Court: I really do not understand the question. What do you mean by that being the usual thing?

Mr. Souza: I want to show, if your Honor please, that there are thousands of stock certificates carried by brokers in the names of nominees for their customers, and particularly in connection with loan accounts it is the usual thing.

The Court: I would think that I could almost take judicial notice of the fact that a lot of certificates down in Wall Street are not in the names of the real owners. I would not have any doubt about it if you never proved it.

Morton F. Stern—For Defendants—Direct.

Mr. Souza: In view of your Honor's statement I won't take up the time of the court.

The Court: I do not know whether I can take judicial notice of it, but I know it to be the fact. I assume everybody knows it. If it is going to be a material fact you had better have your witness say so.

Q. Mr. Stern, is it the fact that where customers maintain margin accounts with brokers, that the stock is carried in a street name sometimes and sometimes in the name of the nominee?

Mr. Fried: May I object on the ground that it is utterly incompetent and irrelevant.

The Court: Overruled.

Mr. Fried: I respectfully except.

A. Shall I answer it at length and explain the Wall Street practice, or the practice which was and still is in effect?

The Court: You can say just yes or no on that question.

The Witness: It is very unusual to carry a stock in the owner's name where it is carried on margin.

Q. Was this account of Jules S. Bache a margin account? A. It was.

Q. With J. S. Bache & Company? A. Yes, sir.

Mr. Souza: That is all.

Mr. Souza: That is the defendants' case, if your Honor please.

The Court: I will consider all your motions are renewed and I again reserve decision. I will assume the plaintiffs move for judgment and I reserve decision on that.

Plaintiffs' Exhibit 1.**SOUTHERN MINNESOTA JOINT STOCK
LAND BANK****OF REDWOOD FALLS, MINNESOTA****CERTIFICATE No. 7079****For 50 Shares****Issued to****CHAS. ARMBRECHT****c/o J. S. Bache and Co., 42 Broadway New York****Dated 1/20 1928****Transferred from J. S. BACHE AND Co.****Dated , 19****No. Original
Certificate****3049****No. Original
Shares****80****No. of Shares
Transferred****50****Received of the****SOUTHERN MINNESOTA JOINT STOCK LAND BANK
OF REDWOOD FALLS, MINNESOTA****STOCK CERTIFICATE****No. 7079 — For 50 Shares of Stock****Date Jan 23 1928****Signed J. S. BACHE & Co.****Permanent Address 42 Bway N Y City**

Plaintiffs' Exhibit 2.**SOUTHERN MINNESOTA JOINT STOCK
LAND BANK****OF REDWOOD FALLS, MINNESOTA****CERTIFICATE No. 7080****For 50 Shares****Issued to****CHAS ARMBRECHT****c/o J. S. Bache & Co., 42 Broadway N. Y. C.****Dated 1/20 1928****Transferred from J. S. BACHE AND Co.****Dated , 19**

<i>No. Original Certificate</i>	<i>No. Original Shares</i>	<i>No. of Shares Transferred</i>
3049	80	30
6098	10	10
6038	10	10

Received of the**SOUTHERN MINNESOTA JOINT STOCK LAND BANK****OF REDWOOD FALLS, MINNESOTA****STOCK CERTIFICATE****No. 7080 — For 50 Shares of Stock****Date Jan 23 1928****Signed J. S. BACHE & Co.****Permanent Address 42 Bway N Y City**

Plaintiffs' Exhibit 3.

CHARLES ARMBRECHT

c/o J. S. Bache and Co., 42 Broadway, New York

Nos. of Ctfs.

<i>When Issued</i>	<i>Old</i>	<i>New</i>	<i>From Whom Received</i>	<i>No. of Shares</i>	<i>Balance</i>
1928					
Jan 20	3049	7079	J. S. Bache and Co.	50	
" "	3049	7080	" " " "		
" "	6098	"	" " " "		
" "	6038	"	" " " "	50	100

J. S. BACHE & CO.

SOUTH MINNESOTA JT. STOCK LAND BANK

2269

Cr.

Dr.

	May 1932		Jan Dec 1933		May 1932		Jan Dec 1933			
1931	Oct	31	31	31	6	1931	Oct	31	31	6
						Box	# 1	100	100	X

J S Bache	Long a/c	100	100	X
	Loan a/c			100 X

Plaintiffs' Exhibit 5.

Plaintiffs' Exhibit 5 is a printed copy of the complaint in the action entitled George C. Holmberg, et al., Complainants against Annie Anchel, et al., Defendants, in the United States District Court, Southern District of New York. Annexed sheets as Schedule A are a list of stockholders as they appeared upon the records of the bank and the addresses, and the defendant Charles Armbrecht was listed "Care J. S. Bache & Co., 100 shares, par value \$10,000."

Plaintiffs' Exhibit 6.

DEPARTMENT OF JUSTICE

UNITED STATES MARSHAL
SOUTHERN DISTRICT OF NEW YORK
United States Court House

New York City May 18, 1937

GEORGE C. HALMBERG

vs.

ANNIE ANCHEL, et al.

Mr. Franklin S. Wood
120 Broadway
New York City

Dear Sir:

Enclosed please find my check #4709, for the sum of \$103.40, balance of your deposit in the above entitled action.

Yours truly,

JOHN J. KELLY

John J. Kelly

U. S. Marshal, SDNY.

LL
ENC.

Plaintiffs' Exhibit 7.*(Envelope)*

C. Fried
 1868 Harrison Ave.
 Bronx, N. Y.
 120 Bway

Mr. Charles Ambrecht
 J. S. Bache & Company
 36 Wall Street
 New York, N. Y.

(Postmarked on Envelope:)

Church St. Annex—May 5, 1942
 Wall St. Station —May 6, 1942
 —May 12, 1942

Return to sender

Not found with care 2nd trip 5-6-42 C3449

Registered Mail

Return Receipt Requested

Deliver to Addressee Only

Registered No. 314400

Plaintiffs' Exhibit 8.

Plaintiffs' Exhibit 8 is an affidavit of mailing the order permitting publication to the record stockholders of the bank in the action entitled George C. Holmberg, et al., Complainants against Southern Minnesota Joint Stock Land Bank of Minneapolis, et al., Defendants in the United States District Court, District of Minnesota, Fourth Division.

Plaintiffs' Exhibit 9.

October 19, 1935.

Mr. Charles Armbrecht,
c/o J. S. Bache & Co.,
42 Broadway,
New York City.

Dear Sir:

Your name appears upon the books of the Southern Minnesota Joint Stock Land Bank of Minneapolis as the record holder of 100 shares of its stock of the total par value of \$10,000. The said Joint Stock Land Bank is now in receivership, and by decree of the United States District Court, dated April 20, 1935, a 100% assessment has been levied against all stockholders, together with interest from the date of the decree.

Enclosed herewith for your information is a copy of an extract from the decree of the Court and of the Findings of Fact and Conclusions of Law by the Court upon which the decree is based.

Demand is hereby made by me as counsel to the Receiver, Mr. Ervin J. Friede, for the immediate payment of the said sum of \$10,000, with interest from April 20, 1935. In the event that payment is not made promptly, legal proceedings will be instituted against you to enforce the decree of the Court and collect the assessment, together with the costs and additional interest.

Very truly yours,

FSW:M
ENC.

Plaintiffs' Exhibit 10.

October 1, 1935

Mr. Charles Armbrecht
Armbrecht Lumber Company
79 Wall Street
New York, New York

Dear Mr. Armbrecht:

Your name appears upon the books of the Southern Minnesota Joint Stock Land Bank of Minneapolis as the record holder of one hundred shares of its stock of the total par value of \$10,000. The said Joint Stock Land Bank is now in receivership, and by decree of the United States District Court, dated April 20, 1935, a 100% assessment has been levied against all stockholders, together with interest from the date of the decree.

Enclosed herewith for your information is a copy of an extract from the decree of the Court and of the Findings of Fact and Conclusions of Law by the Court upon which the decree is based.

Demand is hereby made by me as Counsel to the Receiver, Mr. Ervin J. Friede, for the immediate payment of the said sum of \$10,000, with interest from April 20, 1935. In the event that payment is not made promptly, legal proceedings will be instituted against you to enforce the decree of the Court and collect the assessment, together with the costs and additional interest.

Very truly yours

FSW:LR
Encl.

Plaintiffs' Exhibit 11.**ARMBRECHT LUMBER COMPANY****YELLOW PINE LUMBER****818-20 First National Bank Annex****Eastern Office****Room 505 — 79 Wall St.****New York City****John R. Freal, Mgr.****Incorporated in Alabama****Mobile, Ala. October 8th, 1935.****Mr. Franklin S. Wood****120 Broadway****New York, New York****Dear Sir:**

Your letter of October 1st, addressed "Mr. Charles Armbrecht Armbrecht Lumber Company, 79 Wall Street, New York, New York", was opened by the manager of our office in New York and forwarded to me here.

I am the only Charles Armbrecht connected with this Company, and my name is Charles H. Armbrecht. I have never bought, held, owned, or in any other way had stock in the Southern Minnesota Joint Stock Land Bank of Minneapolis, or any other Bank North of the Ohio River. I have never been advised of any transfer to me of stock in the Bank you mention or any other Bank. I knew absolutely nothing about any of the matters on which your letter is based, previous to the receipt of your letter. Now I know nothing about them except what you say in your letter.

I would suggest that as I have no connection what ever with this matter regardless of any records to the contrary,

Plaintiffs' Exhibit 11.

that caution be used in further handling so far as I am concerned.

My brother, Mr. William H. Ambrecht, of the Law Firm of Ambrecht, Twitty and Ambrecht of this city, will probably be in the office of Freihauf, Robinson, and Sloan, Attorneys, 60 Wall Street, New York, next week. After consulting him, I have given him a copy of your letter and a copy of this reply. If you desire to, you may communicate with him there.

Yours truly,

C. H. ARMBRECHT

CHA:hh



Defendants' Exhibit A.

Number 6098

Shares 10

Incorporated Under Federal Farm Loan Act**Under Supervision of Federal Farm Loan Board,
A Bureau of the United States Treasury****PAR VALUE \$100****SOUTHERN MINNESOTA JOINT STOCK
LAND BANK****OF REDWOOD FALLS, MINNESOTA**

THIS CERTIFIES that J. S. BACHE & Co. is the owner of **TEN Shares** of the Capital Stock of **SOUTHERN MINNESOTA JOINT STOCK LAND BANK** of Redwood Falls, Minnesota transferable only on the books of this Corporation in person or by attorney upon surrender of this certificate properly endorsed.

IN WITNESS WHEREOF, the said Corporation has caused this certificate to be signed by its duly authorized officers and its Corporate Seal to be hereunto affixed at Redwood Falls, Minnesota, this **Nineth (9)** day of December, A. D. 1925.

W. B. SIMENT
Secretary

H. A. LEVITH
President

*Defendants' Exhibit A.**(In Margin)*

SOUTHERN MINNESOTA JOINT STOCK LAND BANK
of Redwood Falls, Minnesota

Certificate No. 6098

For 10 Shares

Issued to

J. S. Bache & Co. 42 Broadway, NYC

Dated Dec 9 1925

Transferred from Louis Wise

Dated 11/11/22

<i>No. Original Certificate</i>	<i>No. Original Shares</i>	<i>No. of Shares Transferred</i>
1887	10	10

(On Back)

C E R T I F I C A T E

FOR

10 S H A R E S

SOUTHERN MINNESOTA JOINT STOCK LAND BANK
OF REDWOOD FALLS, MINN.

Issued to J. S. BACHE & Co.

Dated December 9, 1925.

FOR VALUE RECEIVED, hereby sell, assign and trans-
fer unto CHAS. ARMBRECHT

Shares of the Capital Stock represented by the within
Certificate and do hereby irrevocably constitute and appoint
..... Attorney
to transfer the said Stock on the books of the within named
Corporation with full power of substitution in the premises.

Dated Jan 19 1926

In presence of

J. S. BACHE & Co.

.....

Defendants' Exhibit A.

NOTICE. The signature of this assignment must correspond with the name as written upon the face of the certificate, in every particular, without alteration or enlargement or any change whatever.

TRANSFER REQUESTED

J. S. BACHE & Co.

Received of the

**SOUTHERN MINNESOTA JOINT STOCK LAND BANK
New York Joint Stock Land Bank
61 Broadway, N. Y. C.**

STOCK CERTIFICATE

**No. 6098 — For 10 Shares of Stock
Dated 12/9/25**

Signed **J. S. BACHE & Co.**
W. T. WATSON

We hereby certify that the transfer of the within shares to the names indicated by the star is made solely to complete a purchase made by us for our customer, and we have no ownership or interest therein.

J. S. BACHE & Co., 42 B'way, N. Y.

Defendants' Exhibit B.

Number 3049

Shares 80

Incorporated Under Federal Farm Loan Act

Under Supervision of Federal Farm Loan Board,
A Bureau of the United States Treasury

PAR VALUE \$100

**SOUTHERN MINNESOTA JOINT STOCK
LAND BANK**

OF REDWOOD FALLS, MINNESOTA

THIS CERTIFIES that J. S. BACHE & Co. is the owner of EIGHTY Shares of the Capital Stock of SOUTHERN MINNESOTA JOINT STOCK LAND BANK of Redwood Falls, Minnesota transferable only on the books of this Corporation in person or by attorney upon surrender of this certificate properly endorsed.

IN WITNESS WHEREOF, the said Corporation has caused this certificate to be signed by its duly authorized officers and its Corporate Seal to be hereunto affixed at Redwood Falls, Minnesota, this 11th day of February A. D. 1924.

W. B. SIMENT
Secretary

G. W. GOLD
Vice President

*Defendants' Exhibit B.**(In Margin)*

**SOUTHERN MINNESOTA JOINT STOCK LAND BANK
of Redwood Falls, Minnesota**

Certificate No. 3049

For 80 Shares

**Issued to
J. S. Bache & Co. N. Y.
Dated 2-11-24**

Transferred from J. S. Bache & Co.

<i>No. Original Certificate</i>	<i>No. Original Shares</i>	<i>No. of Shares Transferred</i>
1945	100	80

**Received of the
Southern Minnesota Joint Stock Land Bank
of Redwood Falls
Stock Certificate**

**No. 3049 — For 80 Shares of Stock
J. S. Bache & Co., 42 B'way, N. Y.**

*(On Back)***CERTIFICATE****FOR****80 SHARES**

**SOUTHERN MINNESOTA JOINT STOCK LAND BANK
OF REDWOOD FALLS, MINN.**

**Issued to J. S. Bache & Co.
Dated February 11, 1925**

Defendants' Exhibit B.

FOR VALUE RECEIVED, hereby sell, assign and transfer unto CHAS. ARMBRECHT

Shares of the Capital Stock represented by the within Certificate and do hereby irrevocably constitute and appoint Attorney to transfer the said Stock on the books of the within named Corporation with full power of substitution in the premises.

Dated Jan 27 1925

J. S. BACHE & Co.

In presence of

.....

NOTICE. The signature of this assignment must correspond with the name as written upon the face of the Certificate, in every particular, without alteration or enlargement or any change whatever.

We hereby certify that the transfer of the within shares to the names indicated by the star is made solely to complete a purchase made by us for our customer, and we have no ownership or interest therein.

J. S. BACHE & Co., 42 B'way, N. Y.

Defendants' Exhibit C.**Number 6038****Shares 10****Incorporated Under Federal Farm Loan Act****Under Supervision of Federal Farm Loan Board,
A Bureau of the United States Treasury****PAR VALUE \$100****SOUTHERN MINNESOTA JOINT STOCK
LAND BANK****OF REDWOOD FALLS, MINNESOTA**

**THIS CERTIFIES that J. S. BACHE & Co. is the owner of
TEN Shares of the Capital Stock of SOUTHERN MINNESOTA
JOINT STOCK LAND BANK of Redwood Falls, Minnesota
transferable only on the books of this Corporation in
person or by attorney upon surrender of this certificate
properly endorsed.**

**IN WITNESS WHEREOF, the said Corporation has
caused this certificate to be signed by its duly author-
ized officers and its Corporate Seal to be hereunto
affixed at Redwood Falls, Minnesota, this Seventeenth
(17) day of November, A. D. 1925.**

**W. B. SIMENT
Secretary**

**H. A. LEVITH
President**

*Defendants' Exhibit C.**(In Margin)*

SOUTHERN MINNESOTA JOINT STOCK LAND BANK
of Redwood Falls, Minnesota

Certificate No. 6038

For 10 Shares

Issued to

J. S. Bache & Co. 42 Broadway, N Y C

Dated Nov 17 1925

Tranferred from J. S. Bache & Co.

Dated 11/10/25

<i>No. Original Certificate</i>	<i>No. Original Shares</i>	<i>No. of Shares Transferred</i>
6009	20	10

(On Back)

CERTIFICATE

FOR

10 SHARES

SOUTHERN MINNESOTA JOINT STOCK LAND BANK
OF REDWOOD FALLS, MINN.

Issued to J. S. Bache & Co.

Dated November 17, 1925.

FOR VALUE RECEIVED, hereby sell, assign and transfer unto CHAS. AMBRECHT c/o J. S. Bache & Co.

Shares of the Capital Stock represented by the within Certificate and do hereby irrevocably constitute and appoint

Attorney to transfer the said Stock on the books of the within named Corporation with full power of substitution in the premises.

Dated Jan 19 1926

In presence of

J. S. Bache & Co.

Defendants' Exhibit C.

NOTICE. The signature of this assignment must correspond with the name as written upon the face of the certificate, in every particular, without alteration or enlargement or any change whatever.

TRANSFER REQUESTED

J. S. BACHE

Received of the
SOUTHERN MINNESOTA JOINT STOCK LAND BANK
New York Joint Stock Land Bank
61 Broadway, N. Y. C.

STOCK CERTIFICATE
No. 6038 — For 10 Shares of Stock

Signed **J. S. Bache & Co.**
H. CANN

We hereby certify that the transfer of the within shares to the names indicated by the star is made solely to complete a purchase made by us for our customer, and we have no ownership or interest therein.

J. S. Bache & Co., 42 B'way, N. Y.

3

Findings of Fact, Conclusions of Law and Opinion.**UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.**

GEORGE C. HOLMBERG et al.,
 Plaintiffs,
 against

MAUDE D. DUMONT et al.,
 Defendants.

Civ. 18-110

GEORGE C. HOLMBERG et al.,
 Plaintiffs,
 against

GILBERT MILLER et al., as Executors under
 the last will and testament of Jules S.
 Bache, deceased, and another,
 Defendants.

Civ. 23-247

OPINION

FRANKLIN S. WOOD, Esq., Attorney for Complainants, 120
 Broadway, New York, N. Y. CLARENCE FRIED, Esq., of
 Counsel.

MESSRS. COOK, LEHMAN, GREENMAN, GOLDMARK & LOEB,
 Attorneys for defendants, 20 Pine Street, New York,
 N. Y. EDGAR M. SOUZA, Esq., of Counsel.

JOHN W. CLANCY, U. S. D. J.

Findings of Fact, Conclusions of Law and Opinion.

CLANCY, D. J.

FINDINGS OF FACT

1. Plaintiffs were, on the second day of May, 1932, and still are creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis which was closed on that day and was insolvent with an excess of liabilities over assets greater than \$3,000,000—more than the par value of all the issued stock. On that day the defendant Charles Armbrecht was the record owner of 100 shares of stock of the par value of \$10,000 issued by that bank and Jules S. Bache, the testator of the defendant executors, was the beneficial owner of these 100 shares. The defendant Armbrecht had been employed by the firm of J. S. Bache & Co. for a period of fifty years up to the year 1933 when he was pensioned and thereafter called weekly at the office of J. S. Bache & Co. for his pension. Jules S. Bache was in 1931 and until his death in 1944 a member of the firm of J. S. Bache & Co.

2. The defendant Stern is a member of J. S. Bache & Co., who do now and did since before 1924 operate a brokerage business. Between 1924 and 1931 three certificates, aggregating 100 shares of the stock of the Land Bank were issued to and held in some capacity by J. S. Bache & Co. In 1931 these three certificates were delivered to the bank to have a transfer of the 100 shares represented thereby to Charles Armbrecht, whose address was c/o J. S. Bache & Co., effected and the stock issued to Armbrecht accordingly. The transfer was effected and two new certificates, each for fifty shares, were issued in the name of the defendant Armbrecht and sent to J. S. Bache & Co. as brokers. This firm carried among their accounts one for Jules S. Bache, an individual member of the firm and the certificates, the beneficial ownership of which was at all times in Jules S.

Findings of Fact, Conclusions of Law and Opinion.

Bache, were credited to the long account of Jules S. Bache, the individual, between October, 1931 and January, 1933 and held by the firm as security for that account during that time. There is no evidence in the case that the firm of J. S. Bache & Co. acted in any other capacity than that of broker in procuring the issuance of the stock to Armbrecht in 1931 or as pledgee of the stock in maintaining a margin account for Jules S. Bache who owned it.

3. On August 23, 1932 a notice of the institution of an action to collect the sum for which he was liable as record owner of the stock was given defendant Armbrecht by mail. He was then an employee of J. S. Bache & Co. On October 19, 1935 a notice of his liability on the stock and demand for its payment was received by him in the mail.

4. From May 1932 until January, 1937 when the remittitur of the Circuit Court in *Holmberg v. Carr* was handed down and judgment entered accordingly, plaintiffs had reason to believe they owned no cause of action against the bank's stockholders. The ancillary receiver of the bank's local credits had, on August 13, 1936, served defendant Armbrecht in an action then instituted by him. Armbrecht had defaulted in answer. A default judgment was not entered against him because it was reasonable to put in all the required proof against all of the defendants at one time and the decision in *Holmberg v. Carr* vitiated the entire action.

5. In an action against some local stockholders instituted by plaintiff in 1937 following the *Holmberg v. Carr* decision service was not effected on defendant Armbrecht, the United States Marshal certifying that he could not be found. One of the plaintiffs' attorneys in person during the summer of 1937 inquired of the superintendent of 2565 Marion Avenue, Bronx, New York City, at which address

Findings of Fact, Conclusions of Law and Opinion.

it was said Armbrecht had been served in the Receiver's 1936 action, and was unable to find by his inquiries any new address for him. A process server was employed and was unable to locate Armbrecht for service. The case went to trial in May and June, 1938. Judgment was entered in January, 1939 and was affirmed in April, 1940.

6. In May, 1942 plaintiffs' attorneys who had, in December, 1941 or January, 1942 acquired information that Armbrecht was a former employee of J. S. Bache & Co. instituted suit against, among others, the partners in the firm of J. S. Bache & Co., Armbrecht and others but of the partners named served only Stern. This attorney sent a registered letter to Charles Armbrecht, c/o J. S. Bache & Co., 36 Wall Street, New York City, which was returned endorsed not found, even on a second visit. A process server swore to his service upon defendant Armbrecht at his son's home. An address from which Armbrecht had moved was eventually given to him by Stern's attorneys as a consideration for an extension of time for Stern to answer but a process server verified an affidavit of service on him at his son's home. In October, 1943 the alleged service of the summons on the defendant Armbrecht in this action was quashed, the motion therefor having been made in March. Immediately this action was instituted against Armbrecht and Jules S. Bache, the other defendants' testator.

7. The first action in which the summons against Armbrecht was quashed for failure to serve and this action were consolidated. The defendant Armbrecht is well now on to being a nonagenarian and the defendants' testator Bache died March 24, 1944. The firm of J. S. Bache & Co. has destroyed its records for the period before 1935.

8. The plaintiffs have not been guilty of laches.

Findings of Fact, Conclusions of Law and Opinion.

CONCLUSIONS OF LAW.

1. The complaint is dismissed as against the defendant Stern. *Pufabal v. Fidelity Nat'l Bank*, 40 Fed. (2d) 25.

2. Plaintiffs are entitled to judgment against Charles Ambrecht and the executors of Jules S. Bache, with costs, the defendant executors to be primarily ~~liable~~ and the defendant Ambrecht secondarily liable as between themselves.

* * * * *

The form of action which has been determined to be proper form for recovery of liability declared in the statute 12 U. S. C. A. 812, is a bill in equity (*Wheeler v. Green*, 280 U. S. 49) to be brought by the creditors (*Holmberg v. Carr*, 86 Fed. (2) 727). Therefore the state statute of limitations is not recognized law in this court. *Russell v. Todd*, 309 U. S. 280; *York v. Guaranty Trust Co.*, 143 Fed. (2) 503. The liability of the statute is intended to afflict every shareholder but is enforceable only where each resides and since their wide geographical distribution is normally to affect the remedy would certainly not work out equally and ratably but inequitably as between themselves if the several stockholders found each a shield in his state's statute of limitations.

The tortuous progress of the plaintiffs and their attorneys through the numerous difficulties which the history of their pursuit of these defendants reveals was necessarily slow and the criticism of their acts as lending itself to a charge of laches could find favor only if the defendants were prejudiced by a failure of due expedition. We do not sustain the charge that expedition was lacking. As we see it they did everything that is ordinarily done to locate a prospective defendant. But even assuming that they were slow their conduct neither caused nor occasioned any prejudice to the defendants. It has been asserted that the de-

Findings of Fact, Conclusions of Law and Opinion.

struction of the Bache firm's records made it impossible to prove something or other; just what was not made clear. But that Armbrecht was the real owner of the stock in May 1932 is not disputed and that Bache was the beneficial owner is admitted, so what happened to the certificate before or since or why Bache put the stock in Armbrecht's name is immaterial. Bache's death was fortuitous. He had already admitted his beneficial ownership in the stock. He had ample time to prepare for trial if any issue were to be disputed. Furthermore, when Bache used Armbrecht as a dummy to suit his own purpose he forsook any claim to later injury for failure to recognize him as a defendant earlier and that claim now comes with bad grace.

Neither has Armbrecht any reason to complain of laches. His answer, "I don't remember" when asked if he ever knew of the issuance of the shares of stock to him is certainly wholly insufficient to raise any equity in his favor and we do not conclude as his attorney does that this means his memory is presently worse than it was ten years ago.

The answer on his examination meant he had no explanation of the fact. He knew the assertion of his liability since shortly after it accrued and did nothing to meet it nor did he repudiate his imputed ownership. Whether or not he communicated this news to Bache or any of his partners then does not appear. That he did nothing to meet his alleged liability or to pass it to the shoulders of the beneficial owner, even though that owner was in some sense his patron indicates if anything that he willingly lent himself to Bache's escape. The delay has not changed his position nor prejudiced him in any respect.

Dated: New York, N. Y., November 1, 1944.

JOHN W. CLANCY,
United States District Judge.

Judgment.**DISTRICT COURT OF THE UNITED STATES****FOR THE SOUTHERN DISTRICT OF NEW YORK**

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,

Complainants,
against

MAUDE D. DUMONT, NEHEMIAH FREEDMAN, CHARLES ARMBRECHT and J. S. BACHE, HAROLD L. BACHE, MORTON F. STERN, ARTHUR F. BRODERICK, WILLIAM REID, WALTER F. SCHULTZE, HUGO J. LION, CHARLES A. COREY, SAMUEL J. SMITH, GEORGE WEISS and CLIFFORD W. MICHEL, co-partners doing business under the style and name of J. S. BACHE & COMPANY,

Defendants.

Civ. 18-110.

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,

Complainants,
against

CHARLES ARMBRECHT, GILBERT MILLER, BARBARA RICHARDS MICHEL, MURIEL RICHARDS PERSHING and DOROTHY RICHARDS HIRSHON, as Executors under the Last Will and Testament of Jules S. Bache, deceased.

Defendants.

Civ. 23-247.

These consolidated causes came on to be heard on the 10th and 16th days of October, 1944, both parties appear-

Judgment.

ing by counsel, and the issues having been duly tried and the evidence of all parties having been duly submitted and heard and having been duly argued by counsel and this court having made written findings of facts and conclusions of law, after due deliberation, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. The complainants George C. Holmberg, Frank C. Ball, Carl J. Easterberg, George F. Hardie and Pat G. Morris on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis are entitled to judgment against Gilbert Miller, Barbara Richards Michel, Muriel Richards Pershing and Dorothy Richards Hirshon, as executors under the Last Will and Testament of Jules S. Bache, deceased, and against Charles Ambrecht in the amount of \$10,000 together with costs and disbursements in the amount of \$45.06, as taxed, making a total of \$10,045.06.

2. As between the defendant Charles Ambrecht and the defendants Gilbert Miller, Barbara Richards Michel, Muriel Richards Pershing and Dorothy Richards Hirshon, as executors of the Last Will and Testament of Jules S. Bache, deceased, the defendant Charles Ambrecht shall be secondarily liable and the defendants Gilbert Miller, Barbara Richards Michel, Muriel Richards Pershing and Dorothy Richards Hirshon, as executors of the Will of Jules S. Bache, deceased, shall be primarily liable.

3. The suit Civil 18-110 be dismissed with costs and disbursements of \$45.06 as taxed, as against the defendant Morton F. Stern as a co-partner doing business under the style and name of J. S. Bache & Company.

4. The monies collected in this suit constitute a fund to be administered by this court as a court of equity for the

Judgment.

equal benefit of all creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis as this court may hereafter determine and this court reserves jurisdiction as to all matters concerning the administration, application and distribution of such funds and the payment of counsel fees and expenses in the present suit.

Approved, November 9th, 1944.

JOHN W. CLANCY,
U. S. D. J.

Judgment rendered November 10th, 1944.

GEORGE J. H. FOLLMER, JR.,
Clerk.

Notice of Appeal.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

GEORGE C. HOLMBERG, et al.,	}	Civ. 23-247.
Complainants,		
against		
GILBERT MILLER, et al.,		
Defendants.		

Sirs:

NOTICE IS HEREBY given that the defendants Gilbert Miller, Barbara Richards Michel, Muriel Richards Pershing and Dorothy Richards Hirshon, as Executors under

Notice of Appeal.

the Last Will and Testament of Jules S. Bache, deceased, and defendant Charles Armbrecht hereby appeal to the Circuit Court of Appeals, Second Circuit, from each and every part of the joint final judgment entered in the Clerk's Office of the United States District Court, Southern District of New York on November 10, 1944, in Civil Action 18-110 and Civil Action 23-247, except so much thereof as dismisses the complaint in Civil Action 18-110 against Morton F. Stern, a co-partner of the firm of J. S. Bache & Co.

Dated, New York, November 21, 1944.

Yours, etc.,

COOK, LEHMAN, GREENMAN, GOLDMARK & LOEB,
Attorneys for Defendants Gilbert Miller,
et al., as Executors, etc., and Charles
Armbrecht,

Office and P. O. Address,
No. 20 Pine Street,
Borough of Manhattan,
New York 5, N. Y.

To:

GEORGE H. J. FOLLMER, Esq.,
Clerk of the United States District Court,
Southern District of New York.

FRANKLIN S. WOOD, Esq.,
Attorney for Plaintiffs,
20 Exchange Place,
New York, N. Y.

Order Amending Finding No. 6.**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK**

GEORGE C. HOLMBERG, et al.,
Plaintiffs,
against

Civ. 18-110.

MAUDE D. DuMONT, et al.,
Defendants.

GEORGE C. HOLMBERG, et al.,
Plaintiffs,
against

Civ. 23-247.

GILBERT MILLER, et al., as Executors under
the Last Will and Testament of Jules S.
Bache, deceased, and another,
Defendants.

The defendants Gilbert Miller, Barbara Richards Michel, Muriel Richards Pershing and Dorothy Richards Hirshon, as Executors under the Last Will and Testament of Jules S. Bache, deceased, and Charles Armbrrecht, having moved this Court for an order amending the findings of fact and conclusions of law, and making new and additional findings of fact and conclusions of law, having come on to be heard, now upon reading the notice of motion dated November 20, 1944, the affidavit of Edgar M. Souza verified November 20, 1944, and after hearing Edgar M. Souza, of Counsel for said defendants, in support of said motion, and Clarence Fried, of Counsel for plaintiff, in opposition thereto, it is,

On motion of Cook, Lehman, Greenman, Goldmark & Loeb, attorneys for defendants,

Order Amending Finding No. 6

ORDERED, that finding of fact "6" be amended so that the same shall read as follows:

"6. In May, 1942 plaintiffs' attorney who had, in December 1941 or January 1942, acquired information that Armbrecht was a former employee of J. S. Bache & Co., instituted suit against, among others, the partners in the firm of J. S. Bache & Co., Armbrecht and others but of the partners named served only Stern. This attorney sent a registered letter to Charles Armbrecht, c/o J. S. Bache & Co., 36 Wall Street, New York City, which was returned endorsed not found, even on a second visit. A process server swore to his service upon defendant Armbrecht at his son's home. An address from which Armbrecht had moved was eventually given to him by Stern's attorneys as a consideration for an extension of time for Stern to answer but a process server verified an affidavit of service on him at his son's home. In October, 1943 the alleged service of the summons on the defendant Armbrecht in this action was quashed, the motion therefor having been made in March. Immediately this action was instituted against Armbrecht and Jules S. Bache, the other defendants' testator."

And in all other respects said motion is hereby denied.

Dated, New York, December 7th, 1944.

JOHN W. CLANCY, *U. S. D. J.*

Form of order approved. Notice of settlement is hereby waived.

(Sgd.) FRANKLIN S. WOOD,
Attorney for Plaintiffs.

Stipulation as to Record.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

<p>GEORGE C. HOLMBERG, et al.,</p> <p style="text-align: center;">against</p> <p>GILBERT MILLER, et al.,</p>	}	<p>Plaintiffs,</p> <p>Defendants.</p>
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IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record of the said District Court in the above entitled action, as agreed upon by the parties.

Dated, New York, N. Y., February 15, 1945.

FRANKLIN S. WOOD,
Attorney for Plaintiffs-Appellees.

COOK, LEHMAN, GOLDMARK & LÖEB,
Attorneys for Defendants-Appellants.

Clerk's Certificate.**UNITED STATES OF AMERICA,****SOUTHERN DISTRICT OF NEW YORK.**

GEORGE C. HOLMBERG, et al.,
Plaintiffs,

vs.

GILBERT MILLER, et al.,
Defendants.

I, **GEORGE J. H. FOLLMER**, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District in the above-entitled matter as agreed upon by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 13th day of March in the year of our Lord one thousand nine hundred and forty-five and of the Independence of the said United States the one hundred and sixty-ninth.

GEORGE J. H. FOLLMER,

(Seal)

Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 305—October Term, 1944

(Argued April 13, 1945)

Decided July 13, 1945)

GEORGE C. HOLMBERG, *et al.*,

—v.— Plaintiffs-Appellees,

CHARLES ARMBRECHT, *et al.*,

Defendants-Appellants.

Before :

SWAN, AUGUSTUS N. HAND and CLARK,

Circuit Judges.

Appeal from the District Court of the United States
for the Southern District of New York.

Action by George C. Holmberg and four others, on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis, against Charles Armbrecht and Jules S. Bache to recover an assessment upon stock of said bank under 12 U. S. C. A. §812, wherein Gilbert Miller and three others, executors under the will of Jules S. Bache, were substituted for said Bache, deceased. From a judgment for plaintiffs, defendants appeal. Reversed.

EDGAR M. SOUZA, of New York City (Cook, Lehman, Goldmark & Loeb, all of New York City, on the brief), for defendants-appellants.

CLARENCE FRIED, of New York City (Franklin S. Wood, of New York City, on the brief),
for plaintiffs-appellees.

CLARK, Circuit Judge:

This appeal presents the interesting question of the applicability of a state statute of limitations to a federally created equitable right. The District Court held that as to "a bill in equity" "the state statute of limitations is not recognized law in this court," citing *Russell v. Todd*, 309 U. S. 280, and *York v. Guaranty Trust Co.*, 2 Cir., 143 F. 2d 503. Decision of this appeal was delayed to await the Supreme Court's review of the latter case; and upon its reversal by *Guaranty Trust Co. v. York*, 65 S. Ct. , June 18, 1945, the parties herein, with permission of the court, filed supplemental briefs discussing the effect of that most recent precedent. Defendants argue that it is substantially controlling, while plaintiffs contend that it is applicable only to state-created rights enforced under the diversity-of-citizenship jurisdiction of the federal court.

The present action, brought by creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis to recover an assessment of 100 per cent on the par value of stock of the bank under §16 of the Federal Farm Loan Act, 12 U. S. C. A. §812, was instituted in November, 1943, against Charles Armbrrecht, as owner of record, and Jules S. Bache, as beneficial owner, of 100 shares of the bank's stock. Plaintiffs rested federal jurisdiction both on the statute and on the diverse citizenship of the parties. This action represented the culmination of a series of legal moves to recover from the stockholders an amount equal to the par value of their stock following the closing of the bank

May 2, 1932, in a completely insolvent condition. In an action instituted by these plaintiffs on July 28, 1932, the District Court for the District of Minnesota appointed a receiver for the collection of these assessments. *Holmberg v. Southern Minnesota Joint Stock Land Bank of Minneapolis*, D. C. Minn., 10 F. Supp. 795; cf. *Holmberg v. Auchell*, D. C. S. D. N. Y., 24 F. Supp. 594, affirmed *Holmberg v. Merrick*, 2 Cir., 110 F. 2d 1022. Thereafter the receiver, usually obtaining ancillary appointment, brought actions to effect such collection in several state and federal jurisdictions until it became settled that the only method of enforcement of the statutory liability was through an equitable class action brought on behalf of bank creditors. *Holmberg v. Carr*, 2 Cir., 86 F. 2d 727, Dec. 7, 1936; *Christopher v. Brusselback*, 302 U. S. 500, Jan. 3, 1938. In one of the actions which thus failed, defendant Ambrecht was named as a party and was served with process in New York City on August 13, 1936.

On May 2, 1942, to avoid any possible effects of the New York statute of limitations, the plaintiffs instituted an action to recover on this stock against various defendants, including Ambrecht, not served in *Holmberg v. Auchell*, *supra*, and joined as defendants the partners doing business as J. S. Bache & Company. But the only defendant served was Morton F. Stern, a partner of the firm.¹ At a pre-trial examination he testified that J. S. Bache & Company had no interest in the stock and that at the time of the bank's failure Jules S. Bache was the beneficial owner. Thirteen

¹ Defendant Ambrecht on March 24, 1943, moved to quash service claimed to have been made upon him, and the District Court granted his motion on October 28, 1943. Thereafter this action was treated as consolidated with the present action, and they were tried together; but the court found that the partnership had no interest in the stock, and dismissed the earlier action as against Stern. No appeal was taken from this dismissal.

months thereafter and eleven and one-half years after the bank's failure, this action was commenced against Bache and Armbrecht. Defendants pleaded as affirmative defenses laches and the New York ten-year statute of limitations, N. Y. Civil Practice Act, §53, applicable when no other limitation is specifically prescribed. The District Court having granted recovery for the \$10,000 sought, the validity of these affirmative defenses constitutes the sole issue on this appeal.

In denying the defense of laches, the District Court relied on the prior history of these proceedings and agreed with plaintiffs' contention that defendant Bache was guilty of inequitable conduct by placing the stock in the name of Armbrecht in order to avoid possible double liability and by not disclosing the true identity of Armbrecht or his whereabouts so as to make proper service possible. The court also accepted the view that the Bache action could not have been brought before Stern's examination disclosed the identity of the beneficial owner of the stock. Defendants, however, contend that these are conclusions from admitted facts, rather than factual findings, and that they are erroneous, pointing out that the stock was placed in Armbrecht's name long before insolvency, on January 20, 1928 (the District Court's finding that this was done in 1931 is obviously an error, as the documentary records show); that placing stock in the name of a nominee is an old Wall Street custom in no way forbidden by law; that plaintiffs knew of the correct legal procedure as early as 1936, and with reasonable diligence could have discovered and served Armbrecht, who lived throughout the period in the Bronx in New York City, instead of relying upon some process-server's assertion that he could not be found; and that either such an action against Armbrecht or inquiry at the Bache Company would have disclosed at once the interest of Jules

S. Bache in the stock, which was not concealed. Decision of these matters and a fuller recital of the facts bearing upon them become unnecessary, however, in view of our conclusion that the rationale of the *York* case requires the application of the New York statute to this action.

For decision of our problem we must examine both the *York* case and the earlier case which it expounds, namely, *Russell v. Todd*. The latter was an action identical with ours here, for a stock assessment under this same provision of the Federal Farm Loan Act. The Court, finding such liability enforceable only by a single representative suit in equity, held inapplicable the New York three-year statute of limitations governing actions against directors or stockholders of banking associations, N. Y. Civil Practice Act, §49, par. 4, citing state decisions holding this provision inapplicable to purely equitable remedies. It did not have occasion to pass on the ten-year statute (the action there being brought three years and eight months after it accrued), which under state decisions unquestionably affects all forms of equity suits. *Equity Corporation v. Groves*, 294 N. Y. S. 8, 60 N. E. 2d 19; *Ford v. Clendenin*, 215 N. Y. 10, 16, 109 N. E. 124, Ann. Cas. 1917A 658; *Gilmore v. Ham*, 142 N. Y. 1, 6, 36 N. E. 826, 40 Am. St. Rep. 554; *Mencher v. Richards*, 256 App. Div. 280, 282, 9 N. Y. S. 2d 990. In fact it answered the claim that under New York law laches was not a defense and that in the light of *Eric R. Co. v. Tompkins*, 304 U. S. 64, 114 A. L. R. 1487, and *Ryghlin v. New York Life Ins. Co.*, 304 U. S. 202, federal courts "are no longer free to apply a different rule" in the exercise of their statutory equitable jurisdiction by saying, 309 U. S. at page 294: "But in this case laches has not been held to be a defense and the Court has not declined to give effect to a state statute shown to be applicable. In the circumstances we have no occasion to consider the extent to which federal

courts, in the exercise of the authority conferred upon them by Congress to administer equitable remedies, are bound to follow state statutes and decisions affecting those remedies."

The opinion in the *York* case begins by quoting this reservation of the *Todd* case and then says, "The question thus carefully left open in *Russell v. Todd* is now before us." And the Court thereupon decides that recovery in a federal court must be barred by a state statute of limitations if recovery in a state court will be thus barred. True, the Court carefully limits its decisions to diversity cases, saying, "We put to one side the considerations relevant in disposing of questions that arise when a federal court is adjudicating a claim based on a federal law," citing cases under the rubric "for instance." This express reservation is the foundation of the plaintiffs' present contention herein, but we think they push it beyond what the Court intended. The cases cited were *Board of Com'rs v. United States*, 308 U. S. 343; *Deitrick v. Greaney*, 309 U. S. 190; *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U. S. 447; *Clearfield Trust Co. v. United States*, 318 U. S. 363; *O'Brien v. Western Union Telegraph Co.*, 1 Cir., 113 F. 2d 539. These cases, based on federal enactments, state no more than the obvious principle that a rule of state law will be disregarded by a federal court when inconsistent with the federal statute governing the case before it. Hence where the federal statute contains its own period of limitation—e.g., as in the Federal Employers' Liability Act, 45 U. S. C. A. §56—the state law must necessarily yield. But as the Court pointed out in the *Todd* case, 309 U. S. 280, 293, "in the absence of a controlling act of Congress federal courts of equity, in enforcing rights arising under statutes of the United States, will * * * adopt and apply local statutes of limitations which are applied to like causes of action by the state courts." So here, where there is an applicable state statute, we should

give it effect, particularly now that the *York* case has admonished us not to create differences between law and equity actions when the state courts have none.

Plaintiffs, however, stress a footnote to *Russell v. Todd*, 309 U. S. 280, 288, where the Court, in giving an historical résumé of federal precedents, pointed out that federal courts of equity had not considered themselves obligated to apply local statutes of limitations when they conflicted with equitable principles, "as where they apply, irrespective of the plaintiff's ignorance of his rights because of the fraud or inequitable conduct of the defendant." From its setting in a footnote and its context, this appeared to be intended as a statement of historical background, rather than present law; and this was emphasized by the Court's caveat at the end of its decision, quoted above. That this was actually the Court's meaning seems now demonstrated both by the discussion in the *York* case and by what has happened to the precedents cited. The ones really directly on the point urged by plaintiffs are *Kirby v. Lake Shore & M. S. R. Co.*, 120 U. S. 130, and *Stevens v. Grand Central Mining Co.*, 8 Cir., 133 F. 28, and *Johnson v. White*, 8 Cir., 39 F. 2d 793, 798, both based on the *Kirby* case. But the *Kirby* case was overruled by the *York* case, the Supreme Court stating that "nothing that was decided, unless it be the *Kirby* case, needs to be rejected." Consequently any limitation based on the *Kirby* case that might be read into the *Todd* case was also rejected.

The *York* case indeed went further than this. The essence of its holding is that limitations go to the substantive rights of the parties, which ought not to vary with the remedy; and hence there should be no distinction in limitation periods in diversity cases between those arising under the federal court's equity powers and those arising in law, provided the respective state statutes and decisions make

no such distinction. And no sound reason is offered why such a distinction should be made when, as here, the right sought to be enforced is created by a federal statute. In enforcing legal rights under a federal statute, state limitation statutes have always been applied, as in proceedings to enforce private rights under the antitrust laws, *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390; *Holmes, J.*; *cf. Momand v. Universal Film Exchange*, D. C. Mass., 43 F. Supp. 996, 1008, *Wyzanski, J.*; *Hansen Packing Co. v. Swift & Co.*, D. C. S. D. N. Y., 27 F. Supp. 364, *Galston, J.*, or for the infringement of patents, *Campbell v. City of Haverhill*, 155 U. S. 609, or for the statutory liability of a shareholder in a national bank, *McDonald v. Thompson*, 184 U. S. 71; *Rawlings v. Ray*, 312 U. S. 96. It would be anomalous, indeed, to hold rights under these important federal laws strictly subject to state limitations, and at the same time to permit the most extreme variation in the bar period for actions to enforce the statutory liability of a shareholder in a federal land bank. Such a divergence in treatment is opposed not only to common sense, but also to the clear implications of the *York* case. For that case quoted with approval the following statement from the dissenting opinion of Judge A. N. Hand, below: "In my opinion it would be a mischievous practice to disregard state statutes of limitations whenever federal courts think that the result of adopting them may be inequitable. Such procedure would promote the choice of United States rather than of state courts in order to gain the advantage of different laws." *York v. Guaranty Trust Co.*, 2 Cir., 143 F. 2d 503, 531.

This principle is true here as in diversity cases. For the assessment authorized by this statute is enforceable in state courts. See *Friede v. Jennings*, 121 Conn. 220, 184 A. 369; *Friede v. Sprout*, 294 Mass. 512, 2 N. E. 2d 549; *In re*

Christopher's Estate, Ohio App., 35 N. E. 2d 454. As we have already pointed out, the New York courts in such a proceeding would naturally apply the ten-year statute, just as Ohio applied its probate statute of nonclaim in the case last cited. To permit a different treatment in the federal courts would therefore constitute an undesirable inroad on the practical policy of uniformity embodied in *Eric R. Co. v. Tompkins*, *supra*, to the same extent as the permission of such variation would have been in the *York* case. Thus the ten-year statute must apply absolutely, and plaintiffs' claim is therefore barred. This in fact was the result reached by the Eighth Circuit in the quite similar case of *Ball v. Gibbs*, 118 F. 2d 958. See also *Roos v. Texas Co.*, 5 Cir., 126 F. 2d 767; *Overfield v. Pennroad Corp.*, 3 Cir., 146 2d 889.

Reversed for judgment for defendants.

**UNITED STATES CIRCUIT COURT OF APPEALS
SECOND CIRCUIT**

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of July, one thousand nine hundred and forty-five.

Present :

**HON THOMAS W. SWANN, HON. AUGUSTUS N. HAND, HON.
CHARLES E. CLARK,** *Circuit Judges.*

GEORGE C. HOLMBERG, et al, Plaintiffs-Appellees,

v.

CHARLES ARMBRECHT, et al., Defendants-Appellants

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[Endorsed: United States Circuit Court of Appeals,
Second Circuit. George C. Holmberg, et al., v. Charles Arm-
brecht, et al. Order for Mandate. United States Circuit
Court of Appeals: Second Circuit, Filed July 13, 1945.
Alexander M. Bell, Clerk.

(727)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 19, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

Endorsed on Cover: File No. 50208, U. S. Circuit Court of Appeals, Second Circuit. Term No. 5051. George C. Holmberg, Frank C. Ball, Carl J. Easterberg, et al., on Behalf of Themselves and all Other Creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis, Petitioners, vs. Charles Ambrecht and Gilbert Miller, Barbara Richards Michel, et al., as Executors Under the Last Will and Testament of Jules S. Bache, Deceased. Petition for writ of certiorari and exhibit thereto. Filed October 12, 1945, Term No. 505 O. T. 1945.